Report to the ALI Concerning Capital Punishment

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INTRODUCTION AND OVERVIEW

We have been asked by Director Lance Liebman to write a paper for the Institute to help it assess the appropriate course of action with regard to Model Penal Code § 210.6 (adopted in 1962 to prescribe procedures for the imposition of capital punishment). This request stems from two recent developments. First, the Institute has already undertaken a project revisiting the MPC sentencing provisions, but that project has not included any consideration of capital punishment. Second, at the Institute's Annual Meeting in May of 2007, Roger Clark and Ellen Podgor moved "That the Institute is opposed to capital punishment." In response to the motion, an Ad Hoc Committee on the Death Penalty was convened, and in light of that committee's deliberations, Director Liebman gave us the following charge: "to review the literature, the case law, and reliable data concerning the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty and, if retained, what limitations should be placed on its use and what procedures should be required before that sentence is imposed. Another way of asking the question is this: Is fair administration of a system of capital punishment possible?" (Program Committee Recommendation Regarding the Death Penalty, Dec. 3, 2007).

The possible approaches that the Institute might take with regard to § 210.6 at the present time were identified in Dan Meltzer's memorandum on behalf of the Ad Hoc Committee on the Death Penalty (Report on ALI Consideration of Issues Relating to the Death Penalty, Oct. 2, 2007): 1) revise § 210.6, 2) call for abolition, or 3) withdraw § 210.6. Although each of these options obviously allows for various permutations, we agree that these three options mark the Institute's primary choices of action. In light of the difficulties, elaborated below, that would be raised by either the Institute's attempt to revise § 210.6 or the Institute's embrace of an unadorned call for abolition, we believe that the soundest course of action for the Institute would be withdrawal of § 210.6 with an accompanying statement to the effect that, in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option.

This choice comes at a time of widespread reflection about American capital punishment. On the one hand, popular political support for the death penalty appears to remain relatively high, with opinion polls reporting stable majorities (about 70%) embracing the death penalty on a question that asks "Are you in favor of the death penalty for a person convicted of murder?" Thirty-six states presently authorize the death

penalty (as well as the federal government), twenty-four of those states have at least ten inmates on death row, and nineteen of those states have conducted at least ten executions over the past forty years. At the same time, however, use of the death penalty (in terms of executions and especially death sentences) has declined significantly in recent years. Nationwide executions reached a modern-era (post-1976) high of 98 in 1998; the past three years have seen significantly lower totals – 53 (2006), 42 (2007), and 34 (2008 – as of Nov. 20). Nationwide death sentences have dropped even more precipitously, from modern-era highs of around 300 in the mid-1990s (315 (1994), 326 (1995), 323 (1996)), to modern-era lows in each of the past four years (140 (2004), 138 (2005), 115 (2006), 110 (2007)). In addition, executions during the modern era have been heavily concentrated in a small number of states, with five states (Texas (422), Virginia (102), Oklahoma (88), Florida (66) and Missouri (66)) accounting for about two-thirds of the executions nationwide (744/1133). Several states, including California and Pennsylvania, have large death-row populations (CA = 667, PA = 228) but very few executions in the modern era (CA = 13, PA = 3). This snapshot captures both the continuing political support for the death penalty as an available punishment but also significant ambivalence about its use in practice. Although different in its particulars, this snapshot shares some similarities to the state of the American death penalty almost a half century ago when the Institute last addressed capital punishment.

The Institute's initial involvement in American capital punishment resulted in its promulgation of § 210.6 of the Model Penal Code in 1962. As the Meltzer memorandum recounts, the drafters of the MPC considered the problems plaguing the then-prevailing death penalty practices. The provision sought to ameliorate concerns about the arbitrary administration of the punishment and the absence of meaningful guidance in state capital statutes. The MPC provision was essentially ignored until the Supreme Court invalidated all existing capital statutes in *Furman v. Georgia*[1] in 1972. *Furman* raised concerns about the arbitrary and discriminatory administration of the death penalty. These concerns stemmed from the interplay of extremely broad death eligibility in state schemes, the fact of its rare imposition, and the absence of any standards guiding charging or sentencer discretion. After *Furman*, states sought to resuscitate their capital statutes by revising them to address the concerns raised in *Furman*; many of the states turned to § 210.6 as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts. In the 1976 cases addressing five of the revised statutes, state advocates drew particular attention to the fact that many of their provisions were modeled on § 210.6. The Court in turn relied on the expertise of the Institute – particularly its view that guided discretion could improve capital decisionmaking – when it upheld the Georgia, Florida, and Texas statutes.[2] Those

[1] 408 U.S. 238 (1972).

[2] Gregg v. Georgia, 428 U.S. 153, 193 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded 'that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.'") (emphasis in original) (quoting ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959)) (footnote omitted) (the citation to "§ 2.01.6" rather than to "§ 2.10.6" reflects the change in numbering from the 1959 draft to the 1962 Code); Proffitt v. Florida, 428 U.S. 242,

statutes, and the decisions upholding them, provided the blueprint for the modern American death penalty.

The stance that the Court took in 1976 was provisional; it then adopted a role of continuing constitutional oversight of the administration of capital punishment. Each year the Court has granted review in a substantial number of capital cases, and the Court has continually adjusted its regulatory approach to prevailing capital practices. It is clear that the Court's attempt to regulate capital punishment – largely on the model provided by the MPC – has been unsuccessful on its own terms. The guided discretion experiment has not solved the problems of arbitrariness and discrimination that figured so prominently in *Furman*; nor has the Court's regulation proven able to ensure the reliability of verdicts or the protection of fundamental due process in capital cases. An abundant literature, reviewed below, reveals the continuing influence of arbitrary factors (such as geography and quality of representation) and invidious factors (most prominently race) on the distribution of capital verdicts. Most disturbing is the evidence of numerous wrongful convictions of the innocent, many of whom were only fortuitously exonerated before execution, and the continuing concern about the likelihood of similar miscarriages of justice in the future. These failures of constitutional regulation are due in part to the inherent difficulty and complexity of the task of rationalizing the death penalty decision, given the competing demands of even-handed administration and individualized consideration. Moreover, such a difficult task is compounded by deeply rooted institutional and structural obstacles to an adequate capital justice process. Such obstacles include the intense politicization of the capital justice process, the inadequacy of resources for capital defense services, and the lack of meaningful independent federal review of capital convictions.

In many legal contexts, the identification of problems in the administration of justice and obstacles to reform would counsel in favor of the Institute's undertaking a reform project in order to promote needed improvement. The administration of capital punishment, however, presents a context highly unfavorable for a successful law reform project, for several related reasons.

First, numerous other organizations have already undertaken to study the administration of capital punishment, both at the state and the national level. These studies have generated an enormous amount of raw data and a large body of proposed reforms (about which there is a substantial degree of agreement from a variety of sources). A large number of diverse states have undertaken systematic self-studies of the administration of their systems of capital punishment in the recent past. For example, in 2001, Governor George Ryan of Illinois appointed a blue-ribbon, bi-partisan commission to conduct a comprehensive study his state's administration of capital punishment after

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247-48 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (describing Florida statute as "patterned in large part on the Model Penal Code"); Jurek v. Texas, 428 U.S. 262, 270 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (citing Model Penal Code to support its conclusion that the narrowing of capital murder in the Texas statute serves much the same purpose as the use of aggravating factors in Florida and Georgia).

13 exonerations from Illinois' death row.[3] In 2004, a task force of the New Mexico State Bar undertook a comprehensive study of capital punishment in that state.[4] The legislatures of a number of other states have also undertaken systematic studies of their death penalty systems, including Connecticut in 2001,[5] North Carolina in 2005,[6] New Jersey in 2006,[7] Tennessee in 2007,[8] and Maryland in 2008.[9] In addition to these comprehensive studies, virtually every death penalty state has undertaken one or more smaller investigations into various aspects of their capital justice system (such as cost, racial disparities, forensic evidence processing, etc.). The most wide-ranging studies to date are those conducted by the American Bar Association in conjunction with its call for a nationwide moratorium on capital punishment in 1997. In the wake of the adoption of its moratorium resolution, the ABA developed a publication entitled *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, which was intended to serve as "Protocols" for jurisdictions undertaking reviews of death penalty-related laws and processes. The ABA, as part of its Death Penalty Moratorium Implementation Project, has recently completed a three-year study of eight states to determine the extent to which their capital punishment systems achieve fairness and provide due process.[10] A review of the ABA's research and the state self-studies together strongly suggests that the death penalty is not an area in which the Institute can measurably contribute by conducting new research or compiling or explicating existing research.

Second, there is also reason to be skeptical that the Institute will be able to promote needed death penalty reform by adding its voice, with the expertise and prestige that is associated with it, to influence political actors. Capital punishment has remained an issue strongly resistant to reform through the political process in most jurisdictions. Consider first the reforms contained in § 210.6 itself. Although adopted by the Institute in 1962, § 210.6 was ignored in the political realm for a decade, until the Supreme Court constitutionally invalidated capital punishment in 1972, at which point § 210.6 was

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[3] *See* http://www.idoc.state.il.us/ccp/index.html for a copy of the Executive Order, a list of Commission Members, and the Commission's final report. Two years later, Governor Mitt Romney of Massachusetts (an abolitionist state) took a similar step in appointing a blue-ribbon commission; the Massachusetts Commission was charged with determining how to create a "fool proof" death penalty statute that would avoid the erroneous conviction and execution of murderers. *See* http://www.cjpc.org/dp_govs_commission.htm.

[4] *See* http://www.nmbar.org/Attorneys/lawpubs/TskfrcDthPnltyrpt.pdf for a copy of the Task Force's final report.

[5] *See* http://www.ct.gov/.../commission_on_the_death_penalty_final_report_2003.pdf for a copy of the Connecticut Commission's final report.

[6] *See* http://www.deathpenaltyinfo.org/node/1557 (20 members of the North Carolina House of Representatives appointed to undertake study the administration of the death penalty).

[7] *See* http://www.njleg.state.nj.us/committees/njdeath_penalty.asp. New Jersey abolished the death penalty in 2007.

[8] *See* http://www.thejusticeproject.org/press/tn-death-penalty-study-bill-passed/ (16 member expert committee appointed in Tennessee).

[9] *See* http://www.deathpenaltyinfo.org/node/2336 (commission appointed to study racial, socio-economic, and geographical disparities, the execution of the innocent, and cost issues relating to the death penalty in Maryland).

[10] *See* http://www.abanet.org/moratorium/ for the full reports of the ABA Moratorium Implementation Project.

pressed into service by state legislatures in order to revive the moribund penalty. The ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, have likewise failed to succeed in the political realm; indeed, the ABA's Death Penalty Moratorium Implementation Project found in 2007 that not a single one of the eight states that it studied were fully in compliance with any aspect of the ABA *Guidelines* studied. (See discussion in section on "Inadequacy of Resources, *infra*.) Perhaps most telling is the view of Professor Joseph Hoffman, someone who has devoted enormous time and energy to death penalty reform, spearheading death penalty reform efforts in both Illinois and Indiana and serving as Co-Chair and Reporter for the Massachusetts Governor's Council on Capital Punishment. Hoffman served as a member of an advisory group to discuss an earlier draft of this paper, and he strongly expressed the view that seeking reform of capital punishment in the political realm is futile. This is a striking position to take by one who is not morally opposed to the death penalty and who has worked on numerous reform projects. But Hoffman cited as grounds for his change of heart the example of Illinois, in which there were confirmed wrongful convictions in capital cases, a sympathetic Governor, and a bi-partisan reform commission, but still strong resistance in the state legislature to reforms specifically targeted at capital punishment. In short, serious concerns about efficacy in the political realm militate against the undertaking of a new reform effort by the Institute.

Moreover, some of the structural problems in the administration of capital punishment are not the sort of problems that the Institute can address with its legal expertise. While standards for defense counsel, for example, might be considered within the purview of the Institute's expertise, the problem of the intense politicization of the capital process – arising from the decentralization of criminal justice authority within states, the political accountability of many of the key actors in the capital justice system, and the sensationalism of death cases in the media – is a problem largely beyond the reach of legal reform.

Finally, were the Institute to take on a death penalty reform project despite the likelihood of ineffectiveness in the political realm and the fact that some of the underlying problems are not amenable to legal reform, it would run the risk not merely of failing to improve the death penalty, but also of helping to entrench or legitimate it. The undertaking of a reform project, despite its impetus in the flaws of current practice, might be understood as an indication that "the fundamentals" of the capital justice process are sound, or at least remediable. If the Institute upon reflection concludes, as this report suggests, that the administration of capital punishment is beset by problems that cannot be remedied by even an ambitious reform project, the Institute should say so, rather than invest its own time and resources and the hopes of reformers, in a project that will not succeed but may delay the recognition of failure.

We also recommend against the Institute's adoption of the Clark-Podgor motion declaring "[t]hat the Institute is opposed to capital punishment." As this report reflects, our study of capital punishment focuses on its contemporary administration in the United States and the prevailing obstacles to institutional reform. We did not understand our

charge from the Institute to encompass review of moral and political arguments supporting or opposing the death penalty as a legitimate form of punishment. Obviously there is deep disagreement along these dimensions regarding the basic justice of the death penalty. Some supporters view the death penalty as retributively justified (or indeed required). Other supporters maintain that the death penalty deters violent offenses and should be embraced on utilitarian grounds, especially in light of some recent empirical work purporting to establish its deterrent value.[11] Opponents generally reject the retributive argument and insist that capital punishment violates human dignity or vests an intolerable power in the State over the individual. Some opponents reject the empirical claims of deterrence and advance contrary claims of a "brutalization effect" in which executions actually reduce inhibitions toward violent crime.

Resolution of these competing claims falls outside the expertise of the Institute. The Institute is well-positioned to evaluate the contemporary administration and legal regulation of the death penalty. Moreover, the Institute is well-suited to evaluate the success, or lack thereof, of the MPC death penalty provisions in light of their subsequent adoption (in whole or part) by many jurisdictions. If, in its review of the prevailing system and of the prospects for securing a minimally adequate capital process, the Institute were to conclude that the death penalty should not be a penal option, the Institute should frame its conclusion to reflect the basis for its judgment. Endorsement of the Clark-Podgor motion might well be understood to reflect a moral or philosophical judgment rather than a judgment about the inadequacy of prevailing or prospective institutional arrangements to satisfy basic requirements of fairness and accuracy. That perception of the Institute's position would be inconsistent with the focus of this report (and the questions propounded by the Program Committee Recommendation Regarding the Death Penalty) and could possibly undermine the authority of the Institute's voice on this issue.

The remaining question for the Institute is whether to withdraw § 210.6, and if so, whether to include an accompanying statement regarding the withdrawal. The case for withdrawal is compelling and reflects a consensus among the Institute's members who have spoken to the issue thus far. At the outset, it should be noted that several provisions in § 210.6 have been rendered unconstitutional by rulings of the U.S. Supreme Court in the years since 1962. For example, section 210.6's failure to require a jury determination of death eligibility conflicts with the Supreme Court's recognition of a Sixth Amendment right to such a determination;[12] one of § 210.6's aggravating factors ("the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity") has been deemed to be impermissibly vague;[13] and section 210.6's failure to identify mental retardation as a basis for exemption from capital punishment violates the Court's recent Eighth Amendment proportionality jurisprudence.[14] These specific defects could be

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[11] *See generally* Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 Ann. Rev. L. & Soc. Sci. 151 (2005) (reviewing recent empirical studies and their critics).

[12] Ring v. Arizona, 536 U.S. 584 (2002).

[13] Godfrey v. Georgia, 446 U.S. 420 (1980).

[14] Atkins v. Virginia, 536 U.S. 304 (2002).

corrected, but more fundamentally § 210.6 is simply inadequate to address the endemic flaws of the current system. Section 210.6, which in many respects provided the template for contemporary state capital schemes, represents a failed attempt to rationalize the administration of the death penalty and, for the reasons we discuss in greater detail below, its adoption rested on the false assumption that carefully-worded guidance to capital sentencers would meaningfully limit arbitrariness and discrimination in the administration of the American death penalty.

Given the prevailing problems in the administration of the death penalty and the discouraging prospects for successful reform, we recommend that the Institute issue a statement accompanying the withdrawal of § 210.6 calling for the rejection of capital punishment as a penal option under current circumstances ("In light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option."). Such a statement would reflect the view that the death penalty should not be imposed unless its administration can satisfy a reasonable threshold of fairness and reliability.

Mere withdrawal of § 210.6, without such an accompanying statement, would pose two problems. First, the absence of any explanation might suggest that the Institute is simply acknowledging specific defects in the section, or that the Institute believes that the problems afflicting the administration of the death penalty are discrete and amenable to adequate amelioration. Second, and more importantly, the Institute's role is to speak directly and forthrightly on policy questions within its expertise. If the Institute is persuaded that the death penalty cannot be fairly and reliably administered in the current structural and institutional setting, it should say so.

Of course, many of the problems in the capital justice system exist to some degree in the broader criminal justice system as well. Why should these problems call for the rejection of the death penalty as a penal option if such problems could not justify elimination of criminal punishment altogether? Four considerations suggest the distinctiveness of the capital context. First, unlike incarceration, capital punishment is not an essential part of a functioning criminal justice system (as reflected by its absence in many localities, states and, indeed, many countries). While many of the same problems that afflict the prevailing capital system are also present in the non-capital system, the deficiencies of the non-capital system must be tolerated because the social purposes served by incarceration cannot otherwise be achieved. Second, many of the problems undermining the fair and accurate administration of criminal punishment are more pronounced in capital cases. For example, the distorting pressures of politicization exist in both capital and non-capital cases, but the high visibility and symbolic salience of the death penalty heightens these pressures in capital litigation. The inadequacy of resources and the absence of meaningful supervision of counsel are also prevalent throughout the criminal justice system, but these problems appear with greater regularity and severity on the capital side as a consequence the special training, experience, and funding necessary to ensure even minimally competent capital representation. Third, the irrevocability of the death penalty counsels against accepting a system with a

demonstrably significant rate of error. Evidence suggests a higher rate of erroneous convictions in capital versus non-capital cases, and there is little reason to believe that the problem of wrongful convictions and executions will be solved in the foreseeable future. Fourth, deficiencies within the capital system impose significant and disproportionate costs on the broader legitimacy of the criminal justice system. In light of the high visibility and high political salience of capital cases, the arbitrary or inaccurate imposition of the death penalty undermines public confidence in our institutions and generates a distinctive and more damaging type of disrepute than similar problems in non-capital cases.

What follows below is a more thorough account of the existing problems in capital practice, the various efforts to address those problems, and the prospects for meaningful reform. Part I evaluates the course of constitutional regulation over the past three decades. The remaining sections examine the underlying problems and structural barriers that have undermined regulatory efforts (Part II: The Politicization of Capital Punishment; Part III: Race Discrimination; Part IV: Juror Confusion; Part V: The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases; Part VI: Erroneous Conviction of the Innocent; Part VII: Inadequate Enforcement of Federal Rights; Part VIII: The Death Penalty's Effect on the Administration of Criminal Justice). Of course, it is possible to improve discrete aspects of the capital justice process through incremental reform. But achieving the degree of improvement that would be necessary to secure a minimally adequate system for administering capital punishment in the United States today faces insurmountable institutional and structural obstacles. Those obstacles counsel against the Institute's undertaking a reform project and in favor of the Institute's recognition of the inappropriateness of retaining capital punishment as a penal option.

I. The Inadequacies of Constitutional Regulation

The Supreme Court's constitutional regulation of capital punishment, which commenced in earnest with the Court's temporary invalidation of capital punishment in *Furman v. Georgia* in 1972[15] and its reauthorization of capital punishment in *Gregg v. Georgia* in 1976,[16] has produced some significant advances, both substantively and procedurally, in the administration of the death penalty. Indeed, most of these advances track the requirements of § 210.6, which served as a template for many states in reforming their capital schemes to avoid constitutional invalidation. For example, like the MPC, most states try to guide capital sentencing discretion through consideration of "aggravating" and "mitigating" factors in response to the *Furman* Court's rejection of "standardless" capital sentencing discretion and the *Gregg* Court's approval of "guided discretion." Such guidance seeks to avoid the arbitrariness that was guaranteed by the pre-*Furman* practice of instructing juries merely that the sentencing decision was to be made according to their conscience, or in their sole discretion, without any further

[15] 408 U.S. 238.

[16] 428 U.S. 153. *See also Gregg*'s four accompanying cases: *Proffitt*, 428 U.S. 242; *Jurek*, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976).

elaboration. By invalidating the death penalty for rape in 1977[17] and extending that invalidation to the crime of child rape this past Term,[18] the Supreme Court, again like the MPC, has limited capital punishment to the crime of murder,[19] in comparison to the pre-*Furman* world in which death sentences for rape, armed robbery, burglary and kidnapping were authorized and more than occasionally imposed. The Court recently has categorically excluded juveniles and offenders with mental retardation from the ambit of the death penalty.[20] Although the Court has never held that bifurcated proceedings (separate guilt and sentencing phases) are constitutionally required,[21] post-*Furman* statutes have made bifurcation the norm, and it would likely be held to be a constitutional essential today, should the issue ever arise.

Despite these genuine improvements to the administration of capital punishment, constitutional regulation has proven inadequate to address the concerns about arbitrariness, discrimination, and error in the capital justice process that led to the Court's intervention in the first place. At its worst, constitutional regulation is part of the problem. When the Court requires irreconcilable procedures, its own conflicting doctrines doom its efforts to failure. Such conflicts have led several Justices to reject the Court's regulatory efforts as unsustainable. In many more instances, the Court's doctrine, though it may recognize serious threats to fairness in the process or recognize important rights, fails to provide adequate mechanisms to address the threats or vindicate the rights. Some of these inadequacies have led additional Justices to defect in various ways from the Court's death penalty doctrine. Finally, the existence of an extensive web of constitutional regulation with minimal regulatory effect stands in the way of *non*-constitutional legislative reform of the administration of capital punishment – not only because such reform is generally extremely unpopular politically, but also because political actors and the general public assume that constitutional oversight by the federal courts is the proper locus for ensuring the fairness in capital sentencing and that the lengthy appeals process in capital cases demonstrates that the courts are doing their job (indeed, maybe even *over*-doing their job, considering how long cases take to get through the entire review process). What follows is a discussion of the four most serious inadequacies in the constitutional regulation of capital punishment and their implications for reform efforts.

1. The central tension between guided discretion and individualized sentencing. The two central pillars of the Court's Eighth Amendment regulation of capital punishment are the twin requirements that capital sentencers be afforded sufficient guidance in the exercise of their discretion and that sentencers at the same time not be restricted in any way in their consideration of potentially mitigating evidence. The first

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[17] Coker v. Georgia, 433 U.S. 584 (1977).

[18] Kennedy v. Louisiana, 128 S. Ct. 2651 (2008).

[19] The Court limited its holding to crimes against persons, and put to one side crimes against the state such as treason or terrorism. *See id.* at 2659.

[20] Atkins v. Virginia, 536 U.S. 304 (2002) (offenders with mental retardation); Roper v. Simmons, 543 U.S. 551 (2005) (juvenile offenders). The MPC categorically excludes juvenile offenders, and addresses mental retardation by requiring a life sentence when the court is satisfied that "the defendant's physical or mental condition calls for leniency." § 211.6(1)(e).

[21] McGautha v. California, 402 U.S. 183 (1971). The MPC requires bifurcated proceedings. § 210.6(2).

requirement led the Court to reject aggravating factors that rendered capital defendants death eligible but failed to furnish sufficient guidance to sentencers – most notably, factors similar to MPC § 210.6(3)(h): "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." The Court rejected such vague factors as insufficient either to narrow the class of those eligible for capital punishment or to channel the exercise of sentencing discretion.[22] The second requirement led the Court to reject statutory schemes that limited sentencers' consideration of any potentially mitigating evidence, either by restricting mitigating circumstances to a statutory list,[23] or by excluding full consideration of some potentially relevant mitigating evidence.[24]

From the start, the tension between the demands of consistency and individualization were apparent. As early as a year prior to *Furman*, the lawyers who litigated *Furman* and *Gregg* argued that unregulated mercy was essentially equivalent to unregulated selection: "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language."[25] After more than a decade of attempting to administer both requirements, several members of the Court with widely divergent perspectives came to see the incoherence of the foundations of their Eighth Amendment doctrine. In 1990, Justice Scalia argued that the second doctrine – or "counterdoctrine" – of individualized sentencing "exploded whatever coherence the notion of 'guided discretion' once had."[26] Justice Scalia rejected the view that the two doctrines were merely in tension rather than flatly contradictory: "To acknowledge that 'there perhaps is an inherent tension' [between the two doctrines] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing 'twin objectives' is rather like referring to the twin objectives of good and evil. They cannot be reconciled."[27] As a result, Justice Scalia (later joined by Justice Thomas), has chosen between the two commands and rejected the requirement of individualized sentencing as without constitutional pedigree: "Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted."[28]

Four years later, Justice Blackmun came to same recognition of the essential conflict between the doctrines, but reached a different conclusion. Justice Blackmun found himself at a loss to imagine any sort of reform that could mediate between the two conflicting commands: "Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient

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[22] *See, e.g.,* Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988).
[23] *See* Lockett v. Ohio, 438 U.S. 586 (1978).
[24] *See* Penry v. Lynaugh, 492 U.S. 303 (1989).
[25] *See* Brief Amici Curiae of the NAACP Legal Defense and Education Fund, Inc., and the National Office for the Rights of the Indigent at 69, McGautha v. California, 402 U.S. 183 (1971) (No. 71-203).
[26] Walton v. Arizona, 497 U.S. 639, 661 (1990) (Scalia, J., concurring)
[27] *Id.* at 664 (citations omitted).
[28] *Id.* at 673.

discretion to consider fully and act upon the unique circumstances of each defendant would 'thro[w] open the back door to arbitrary and irrational sentencing.'"[29] Unlike Justices Scalia and Thomas, however, Justice Blackmun did not resolve to jettison either constitutional command – not merely because of the demands of *stare decisis*, but "because there is a heightened need for both in the administration of death."[30] Consequently, Justice Blackmun concluded that "the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution."[31]

One Justice's response to the conflict between the need for guidance and the need for individualization was to call for limiting eligibility for capital punishment to a very small group of the worst of the worst – "the tip of the pyramid" of all murderers, in the words of Justice Stevens.[32] If unguided mercy reprieves some from this group, there will still be arbitrariness in choosing among the death eligible, but it will operate on a much smaller scale, and with greater assurance that those who make it to the "tip" belong in the group of the death eligible. However, even if it were agreed that limiting arbitrariness to a smaller arena is sufficient to mediate the conflict between guidance and discretion, this solution is neither constitutionally prescribed nor politically feasible. The Court's "narrowing" requirement is formal rather than quantitative; there is no requirement that any state restrict the ambit of the death penalty to a group of any particular size or with any particular aggravating attributes. And in the absence of a constitutional command, the scope of most capital statutes remains extraordinarily broad. One study, for example, of the Georgia statute upheld in *Gregg* as a model of guided discretion, found that 86% of all persons convicted of murder in Georgia over a five-year period after the adoption of Georgia's new statute were death-eligible under that scheme,[33] and that over 90% of persons sentenced to death before *Furman* would also be deemed death-eligible under the post-*Furman* Georgia statute.[34] The widespread authorization of the death penalty for felony murder, murder for pecuniary gain, and murders that could be described as "cold-blooded," "pitiless," and the like[35] have ensured a wide scope of death eligibility, and capital statutes have tended to grow rather than shrink over time, for reasons that we discuss in greater detail below. (See section on "Politicization.")

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[29] Callins v. Collins, 510 U.S. 1141, 1155 (1994) (Blackmun, J., dissenting from denial of certiorari) (citation omitted).
[30] *Id.*
[31] *Id.* at 1157.
[32] *See Walton*, 497 U.S. at 716-18 (Stevens, J., dissenting).
[33] David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 268 n.31(1990).
[34] *Id.* at 102.
[35] Although the Court initially invalidated vague aggravators like "heinous, atrocious or cruel," it later permitted judicially imposed "narrowing constructions" of such aggravators to save them from unconstitutionality. For example, in Arave v. Creech, 507 U.S. 463 (1993), the Court upheld Idaho's aggravator of "utter disregard for human life" by a narrowing construction that asked sentencers whether the defendant acted as a "cold-blooded, pitiless slayer."

The conflict between guidance and individualization thus has been resolved by the Court not by Justice Stevens' suggestion of strict narrowing, but rather by reducing the requirement of guidance to a mere formality. States must craft statutes that narrow the class of the death eligible to some subset – however large and however defined – of the entire class of those convicted of the crime of murder. In contrast, the Court has enforced the requirement of individualization with greater zeal and demandingness. Consequently, the structure of capital sentencing today is surprisingly similar to the pre-*Furman* structure (bifurcation aside). The sentencer must determine whether the defendant is death eligible – today not merely by conviction of a capital offense by also by the additional finding of an aggravating factor. These factors can be numerous, broad in scope, and still quite vague; indeed, the Court has held that the aggravator can duplicate an element of the offense of capital murder (in which case the aggravator adds nothing to the conviction).[36] After this fairly undemanding finding, the inquiry opens up into pre-*Furman* sentencing according to conscience: the sentencer is asked whether any mitigating circumstances of any type, statutory or non-statutory, call for a sentence less than death. This sentencing structure, which dominates the post-*Furman* world, is not accidental, nor is it the product of deliberate undermining of constitutional norms by states; rather, it is the *product* of constitutional regulation and thus fairly impervious to all but constitutional reform.

We share Justice Blackmun's skepticism about the possibility of adequate constitutional mediation of the needs for heightened guidance and individualization in the capital context. As for Justice Steven's suggestion of the possibility of sharply narrowing the scope of capital punishment, Justice Harlan said it best in 1971, in explaining the Court's rejection of challenges to standardless capital sentencing under the Due Process clause:

> To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.[37]

As for Justice Scalia's suggestion of abandoning the individualization requirement as a constitutional essential, we think the 1976 *Woodson* plurality explanation for why individualization is required remains compelling:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular

[36] *See* Lowenfield v. Phelps, 484 U.S. 231 (1988).
[37] *McGautha*, 402 U.S. at 204, 208.

> offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[38]

In the absence of a constitutional solution, states (and Congress) will continue to operate capital sentencing schemes that fail to adequately address the concerns about arbitrariness and discrimination that led to constitutional intervention in the first instance.

2. Racial disparities and constitutional remedies. The failure of constitutionally mandated guided discretion to offer much in the way of guidance might be less worrisome if there were other constitutional avenues to address discriminatory outcomes. After all, the challenge to standardless capital sentencing that led to the constitutional requirement of guided discretion was premised in large part on the concern that the absence of guidance gave too much play to racial discrimination. The NAACP Legal Defense Fund, the organization that spearheaded the constitutional litigation challenging the death penalty that culminated in *Furman* and *Gregg*, was also involved in litigation under the Equal Protection clause directly challenging racial disparities in the distribution of death sentences. For the first few decades of constitutional regulation of capital punishment, however, the Court avoided this issue, deciding cases that raised it on entirely non-racial grounds.[39] Finally, in 1987, the Court took up the issue directly in *McCleskey v. Kemp*.[40]

McCleskey involved a constitutional challenge to the imposition of the death penalty based on an empirical study conducted by Professor David Baldus and his associates (the Baldus study) using multiple regression statistical analysis to study the effect of the race of defendants and the race of victims in capital sentencing proceedings in Georgia. The study examined over 2,000 murder cases that occurred in Georgia during the 1970's. The researchers used a number of different models that took account of numerous variables that could have explained the apparent racial disparities on nonracial grounds. The study found a very strong race-of-the-victim effect and a weaker race-of-the-defendant effect: after controlling for the nonracial variables, the study concluded that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks, and that black defendants who killed white victims had the greatest likelihood of receiving the death penalty.

The Court rejected McCleskey's challenge to his death sentence on both Equal Protection and Eighth Amendment grounds. The Court assumed for the sake of argument the validity of the Baldus study's statistical findings, but held that proof of racial disparities in the distribution of capital sentencing outcomes in a geographic area in the past was insufficient to prove racial discrimination in a later case. Proof of

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[38] 428 U.S., 304 (plurality opinion of Stewart, Stevens, and Powell, JJ.).
[39] *See, e.g.,* Coker v. Georgia, 433 U.S. 584 (1977); Maxwell v. Bishop, 398 U.S. 362 (1970).
[40] 481 U.S. 279 (1987).

unconstitutional discrimination, held the Court, requires proof of discriminatory *purpose* on the part of the decisionmakers in a particular case. Moreover, in light of the importance of discretion in the administration of criminal justice, proof of such purpose must be "exceptionally clear."[41] In light of this heavy burden, the Court found the Baldus study's results "clearly insufficient" to prove discriminatory purpose under the Equal Protection clause.[42] As for the Eighth Amendment challenge, the Court held that the "discrepancy indicated by the Baldus study is a far cry from the major systemic defects identified in *Furman*."[43] The Court concluded that the "risk of racial bias" demonstrated by the Baldus study was not "constitutionally significant."[44]

In part, the Court's rejection of McCleskey's claim was informed by its concern that there might be no plausible constitutional remedy short of abolition: "McCleskey's claim . . . would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black."[45] (We discuss further the difficult problem of remedies for racial discrimination below in the section on "Race Discrimination.") But the Court's requirement of exceptionally clear proof of discriminatory purpose on the part of a particular sentencer makes constitutional challenges to intentional discrimination essentially impossible to mount. Not surprisingly, there have been no successful constitutional challenges to racial disparities in capital sentencing in the more than two decades since *McCleskey*, despite continued findings by many researchers in many different jurisdictions of strong racial effects. By rendering racial disparities in sentencing outcomes constitutionally irrelevant in the absence of more direct proof of discrimination, the Court has dispatched the problem of racial discrimination in capital sentencing from the constitutional sphere to the legislative one, where it has not fared well. (See "Race Discrimination," below.) Notably, Justice Powell, the author of the 5-4 majority opinion in *McCleskey*, repudiated his own vote only a few years later, when a biographer asked him upon his retirement if there were any votes that he would change, and he replied, "Yes, *McCleskey v. Kemp*."[46]

In rejecting McCleskey's Eighth Amendment claim that the Baldus study demonstrated an unacceptable "risk" of discrimination, the Court relied in part on other "safeguards designed to minimize racial bias in the process."[47] Primary among these safeguards is the Court's *Batson* doctrine. In *Batson v. Kentucky*[48] – decided just one year prior to *McCleskey* – the Court eased the requirement for proving intentional discrimination in the exercise of peremptory strikes by shifting the burden to the prosecution to provide race neutral explanations for strikes when the nature or pattern of strikes in an individual case gave rise to a *prima facie* inference of discriminatory intent.

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[41] *Id.* at 297.
[42] *Id.*
[43] *Id.* at 313.
[44] *Id.*
[45] *Id.* at 293.
[46] David Von Drehle, *Retired Justice Changes Stand on Death Penalty: Powell Is Said to Favor Ending Executions*, Wash. Post, June 10, 1994 (based on interview with John C. Jeffries, Jr., Justice Powell's official biographer).
[47] *McCleskey*, 481 U.S. at 313.
[48] 476 U.S. 79 (1986).

Batson did in fact permit the litigation of many more claims of discrimination in the use of peremptory strikes than the earlier, more demanding *Swain* doctrine,[49] and the Court has been more vigorous in overseeing the enforcement of the *Batson* right in capital cases in recent years.[50]

But the Court's reliance on *Batson* as a means of preventing racial discrimination in capital jury selection is profoundly misplaced. Studies of the effectiveness of *Batson* in reducing the race-based used of peremptory strikes have demonstrated only an extremely modest effect.[51] This is not surprising in light of the incentives that exist to base peremptory strikes at least in part upon the race of prospective jurors and the ease with which "race neutral" explanations for strikes can be offered.

If the race-based use of peremptory strikes depended on racial hatred or the belief in the intrinsic inferiority of minority jurors, then there would undoubtedly be much less race-based use of peremptories than is evident today. However, there is clearly a great deal of what economists call "rational discrimination" in jury selection. Counsel on both sides make decisions about the desirability of jurors from particular demographic groups based on generalizations about attitudes that the group as a whole tends to hold. There is good reason, based on polling data, to believe that blacks as a group are more sympathetic to criminal defendants and less trusting of law enforcement than whites, and that blacks as a group are less supportive of capital punishment than whites. Moreover, in cases involving black defendants, there is reason to believe that black jurors may be more personally sympathetic to the defendant than white jurors and more likely to perceive "remorse" on the part of the defendant, a perception crucial to obtaining life verdicts in capital sentencings.[52] Under such circumstances, capital prosecutors who harbor no personal racial animosity may well see strong reasons to use race as a proxy for viewpoint in using peremptory challenges, especially when they often have little other information to go on.

In implementing *Batson*, the Court has held that a prosecutor's race neutral explanation need not be "persuasive, or even plausible" – it must simply be sincerely non-racial.[53] It can be perilous for a prosecutor to offer as an explanation some aspect of a struck minority juror that is also true of white jurors whom the prosecutor failed to strike.[54] But one sort of explanation remains a virtually guaranteed race neutral explanation – an objection to a prospective juror's demeanor (e.g., the juror appeared hostile, nervous, bored, made poor eye contact, made too much eye contact, smiled or

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[49] *See* Swain v. Alabama, 380 U.S. 202 (1965).

[50] *See* Snyder v. Louisiana, 128 S. Ct. 1203 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 534 U.S. 1122 (2002).

[51] *See, e.g.,* William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171 (2001).

[52] *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Colum. L. Rev. 1538 (1998).

[53] Purkett v. Elem, 514 U.S. 765, 768 (1995) (accepting the prosecutor's professed objection to the struck jurors' hairstyle and facial hair as an acceptable non-racial reason).

[54] These sorts of comparisons formed the basis for the reversals in *Miller-El v. Dretke* and *Snyder*, *supra* note 50.

laughed inappropriately, frowned). Because no lawyer or judge can simultaneously monitor all of the prospective jurors' demeanors throughout all of voir dire, and because perceptions about the meaning of demeanor can vary, there is no way to disprove a prosecutor's claim that a particular juror appeared more "hostile" to him than the others. To reject such an explanation, a trial judge would have to make a credibility determination against a prosecutor – something judges are not prone to do lightly and in the absence of any hard evidence. Moreover, prosecutors may offer such explanations not only from a calculated attempt to preserve a dubious strike, but also in some cases from an honest perception built on the foundations of "rational discrimination." Starting from a belief that black jurors are more hostile to law enforcement or less supportive of the death penalty, a prosecutor in a capital case may genuinely believe that he or she is perceiving hostility from prospective minority jurors.

In short, there is little reason to put much faith in *Batson* as a strong protection against the racial skewing of capital juries. This skewing should concern us not merely because it inevitably affects perceptions about the fairness of the capital justice system, but because there is strong reason to believe that the race of capital jurors affects the outcomes of capital trials (just as there is reason to believe that the race of victims and defendants does).[55]

3. Innocence. Just as *McCleskey* effectively precludes challenges to racial discrimination in capital sentencing (at least challenges based on patterns of outcomes over time), the Court's doctrine also makes virtually no place for constitutional consideration of claims of innocence. In *Herrera v. Collins*,[56] the Court rejected petitioner's claim of actual innocence as a cognizable constitutional claim in federal habeas review. The Court held that while claims of actual innocence may in some circumstances open federal habeas review to other constitutional claims that would otherwise be barred from consideration, the innocence claims themselves are not generally cognizable on habeas. The Court assumed – without deciding – that a "truly persuasive" showing of innocence would constitute a constitutional claim and warrant habeas relief *if* no state forum were available to process such a claim.[57] But, the Court found that Herrera's claim failed to meet this standard. More recently, the Court has suggested just how high a threshold its (still hypothetical) requirement of a "truly persuasive" showing of innocence would prove to be. In *House v. Bell*,[58] the petitioner sought federal review with substantial new evidence challenging the accuracy of his murder conviction, including DNA evidence conclusively establishing that semen recovered from the victim's body that had been portrayed at trial as "consistent" with the defendant actually came from the victim's husband, as well as evidence of a confession to the murder by the husband and evidence of a history of spousal abuse. The Court held that this strong showing of actual innocence was the rare case sufficient to obtain federal habeas review for petitioner's *other* constitutional claims that would otherwise have been barred, because no reasonable juror viewing the record as a whole would lack reasonable

[55] *See* Bowers, et al., *Death Sentencing in Black and White*, *supra* note 51.
[56] 506 U.S. 390 (1993).
[57] *Id.* at 417.
[58] 547 U.S. 518 (2006).

doubt. But even this high showing was inadequate, concluded the Court, to meet the "extraordinarily high" standard of proof hypothetically posited in *Herrera*.[59]

This daunting standard of proof suggests that even if the Court does eventually hold that some innocence claims may be cognizable on habeas, such review will be extraordinarily rare. Thus, the problem of dealing with the possibility of wrongful convictions in the capital context (like the problem of dealing with patterns of racial disparity) has been placed in the legislative rather than the constitutional arena. The reliance on the political realm to deal with the issue of wrongful convictions is less troubling than such reliance on the issue of racial disparities, because there is far more public outcry about the former rather than the latter issue. But the problem of wrongful convictions in the capital context has proven to be larger and more intractable than might have been predicted. The large numbers of exonerations in capital cases may be due in part to the fact that many of the systemic failures that lead to wrongful convictions are likely to be more common in capital than other cases. Moreover, courts have been resistant both to providing convicted defendants with plausible claims of innocence the resources (including access to DNA evidence) necessary to make out their innocence claims, and to granting relief even when strong cases have been made. Finally, larger-scale reforms that might eliminate or ameliorate the problem of wrongful convictions are often politically unpopular, expensive, or of uncertain efficacy. (See section on "Erroneous Conviction of the Innocent," below.)

4. Counsel. Unlike innocence, the problem of inadequate counsel has been squarely held to undermine the constitutional validity of a conviction. Despite the fact that "effective assistance of counsel" is a recognized constitutional right, the scope of the right and the nature of the remedy have precluded the courts from being able to ensure the adequacy of representation in capital cases. Perhaps in response to repeated accounts of extraordinarily poor lawyering in capital cases,[60] the Court recently has granted review and ordered relief in a series of capital cases raising ineffectiveness of counsel claims regarding defense attorneys' failure to investigate and present mitigating evidence with sufficient thoroughness[61] – a development that might be viewed as raising the constitutional bar for attorney performance, at least in the sentencing phase of capital trials.[62] Nonetheless, constitutional review and reversal remain an inadequate means of ensuring adequate representation, both because the constitutional standard for ineffectiveness remains too difficult to establish in most cases, and because the remedy of reversal is too limited to induce the systemic changes that are necessary to raise the level of defense services.

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[59] *Id.* at 555 (quoting *Herrera*).

[60] *See, e.g.,* James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2103-10 (2000); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835 (1994); Marcia Coyle, et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l L. J., June 11, 1990, at 30.

[61] *See* Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

[62] Compare the outcomes and analysis in *Williams*, *Wiggins*, and *Rompilla* to the Court's earlier rejections of claims of ineffective representation in capital sentencing proceedings in Strickland v. Washington, 466 U.S. 668 (1984), and Burger v. Kemp, 483 U.S. 776 (1987).

One of the hurdles to regulating attorney competence through constitutional review is the legal standard for ineffective assistance of counsel. In crafting the governing standard in *Strickland v. Washington*,[63] the Court maintained that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system."[64] In light of the Sixth Amendment's more modest goal of ensuring that the outcome of a particular legal proceeding crosses the constitutional threshold of reliability, the Court established a strong presumption in favor of finding attorney conduct reasonable under the Sixth Amendment, in order to prevent a flood of frivolous litigation, to protect against the distorting effects of hindsight, and to preserve the defense bar's creativity and autonomy. This general deference was amplified for "strategic choices," which the *Strickland* Court described as "virtually unchallengeable."[65] Moreover, the Court declined to enumerate in any but the most general way the duties of defense counsel, instead deferring to general professional norms. Finally, the requirement that a defendant also prove "prejudice" from attorney error (a reasonable probability that the outcome of the trial would be different) necessarily immunizes many incompetent legal performances from reversal, if the guilt of the defendant is sufficiently clear.

The difficulty of meeting the legal standard, even in cases of manifestly incompetent counsel, is amplified by the procedural context in which such claims are made. Although there is often no legal bar to raising claims of ineffective assistance on direct appeal (when indigent defendants still have a constitutional right to appointed counsel), appellate review is appropriate only for record claims, where the basis for asserting ineffective assistance is a trial error evident from the transcript (such as failure to object to the introduction of prejudicial evidence by the state). Claims of ineffective assistance, however, routinely involve the presentation of factual evidence beyond the record – e.g., evidence about information that the defense attorney failed to discover or to introduce, evidence about the likely answers to questions that the defense attorney failed to pursue at trial, or evidence about the defense attorney's interaction with the defendant. Such evidence must be developed in collateral proceedings, where the constitutional right to counsel runs out.[66] Although almost all states formally provide for counsel for indigent defendants in capital post-conviction proceedings,[67] there is virtually no monitoring of the performance of such counsel.[68] Moreover, should post-conviction

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[63] 466 U.S. 668.

[64] *Id.* at 689.

[65] *Id.* at 690. Note that often the primary source of information in ineffective assistance litigation is trial counsel him- or herself, who will often have obvious reasons to resist the implication of ineffectiveness and testify accordingly. Hence, the enormous deference to "strategic choices" allows attorneys who wish to justify their decisions at a later date an obvious means to do so, though the Court did qualify its deference by noting that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

[66] *See* Murray v. Giarratano, 492 U.S. 1 (1989) (rejecting constitutional right to representation for indigent prisoners seeking postconviction relief in capital cases).

[67] Alabama is a notable exception.

[68] *See* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31, 66 (although

counsel fail to perform adequately, *their* ineffectiveness does not preserve the claims that they are seeking to raise from state procedural bars, because there is no constitutional right to counsel in such proceedings.[69] The inadequacy of postconviction representation is compounded by the deferential review of state court decisions under the 1996 habeas statute (AEDPA), which seeks to ensure that state post-conviction proceedings are the primary venue for the litigation of non-record claims. The decline in the number of federal habeas grants of relief in the post-AEDPA era demonstrates the impact that AEDPA has had – an impact necessarily greatest on claims, like those of ineffective counsel, that will rarely see direct review.[70]

The constitutional review and reversal of individual capital convictions is by its nature an inadequate tool for achieving the institutional changes that are necessary in the provision of indigent defense services in capital cases. On the same day that the Court announced the constitutional standard in *Strickland*, it decided a companion case, *United States v. Cronic*,[71] which rejected a claim of ineffectiveness based on the circumstances faced by the defense attorney in litigating the case (lack of time to prepare, inexperience, seriousness of the charges, etc.). The Court insisted that a defendant must identify particular prejudicial errors made by counsel, rather than merely identify circumstances that suggest that errors would likely be made. *Cronic* has widely been held by courts to preclude Sixth Amendment challenges to the institutional arrangements (fee structures, caseloads, availability of investigative or expert services, lack of training and experience, etc.) that lead to incompetent representation, except in the most extraordinary of circumstances.[72] Without any ability to directly control fees, caseloads, resources, or training, courts conducting Sixth Amendment review of convictions can only reverse individual convictions based on individual errors. And even an extended period of substantial numbers of reversals on ineffectiveness grounds has failed to produce substantial reform in the provision of capital defense services. Despite the fact that "egregiously incompetent defense lawyering" was the most common reversible error in capital cases (39%) in a more than two-decade period (1973-1995) with an overall reversible error rate of 68%,[73] there is no reason to believe that these reversals promoted systemic reform. Indeed, the absence of systemic assurance of adequate counsel in

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some states have informal means of monitoring the performance of postconviction counsel, only Florida requires such monitoring).

[69] In Coleman v. Thompson, 501 U.S. 722 (1991), post-conviction counsel's failure to file a timely appeal from the denial of post-conviction relief barred federal habeas review of petitioner's claim regarding the ineffectiveness of his trial counsel. The Court did, however, note without deciding the question whether "there must be an exception [to *Giarratano*] in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* at 755. The Court avoided the question by noting that the default in Coleman's case happened on appeal from a merits denial of post-conviction relief, and thus he had been afforded a forum for litigating his ineffectiveness claim.

[70] *Compare* James Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-95* (2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/ (40% federal habeas reversal rate in capital cases during pre-AEDPA period), with Nancy King, et al., *Habeas Litigation in U.S. District Courts* (2007) (12.5% federal habeas reversal rate in capital cases during post-AEDPA period).

[71] 466 U.S. 648 (1984).

[72] *See* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 Md. L. Rev. 1433 (1999).

[73] Liebman, et al., *A Broken System*, *supra* note 70.

capital cases formed a cornerstone of the American Bar Association's call for a moratorium on executions in 1997, two years after the end of the studied period.[74]

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The best evidence of the inadequacies of constitutional regulation of capital punishment is the sheer number of Justices who have either abandoned the enterprise, in whole or in part, or raised serious questions about its feasibility. The attempt to regulate the capital justice process through constitutional supervision is not in its infancy; the Court has had nearly four decades of experience in implementing it. Notably, two of the four Justices who dissented in *Furman* in 1972 eventually came full circle and repudiated the constitutional permissibility of the death penalty. Justice Blackmun did so in a long and carefully reasoned dissent from denial of certiorari, concluding twenty-two years after *Furman*, that "the death penalty experiment has failed."[75] Justice Powell did so in reviewing his career in an interview with his official biographer after his retirement. Justice Stevens, one of the three-Justice plurality that reinstituted the death penalty in the 1976 cases, this past Term has concluded that the death penalty should be ruled unconstitutional, though he has committed himself to *stare decisis* in applying the Court's precedents.[76] In explaining his own change in constitutional judgment, Justice Stevens offers a long list of concerns about the administration of the death penalty and notes that the Court's 1976 decisions relied heavily on the now untenable belief "that adequate procedures were in place that would avoid the [dangers noted in *Furman*] of discriminatory application . . . arbitrary application . . . and excessiveness."[77] Justices Scalia and Thomas have repudiated the Court's Eighth Amendment jurisprudence as hopelessly contradictory and unable to promote guided discretion. Justices Kennedy, Souter, and Breyer each have authored opinions raising a variety of serious concerns about the administration of capital punishment and the ability of constitutional regulation to prevent injustice.[78] Finally, Justices Sandra Day O'Connor and Ruth Bader Ginsburg have both given speeches questioning the soundness of the capital justice process on the ground of inadequate provision of capital defense services.[79] We can think of no other

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[74] The text of the ABA moratorium and a copy of the supporting report are available at http://www.abanet.org/moratorium/resolution.html.

[75] *Callins*, 510 U.S, at 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

[76] *See* Baze v. Rees, 128 S. Ct. 1520, 1552 (2008) (Stevens, J., concurring).

[77] *Id.* at 1550.

[78] *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2661 (2008) (emphasizing "the imprecision [in the definition of capital murder] and the tension between evaluating the individual circumstances and consistency of treatment" that plague the administration of the death penalty as a reason for not extending the penalty to cases in which the victim does not die) (majority opinion joined by Stevens, Souter, Ginsburg, and Breyer); Kansas v. Marsh, 548 U.S. 163, 207-11 (2006) (emphasizing the risk of erroneous conviction in the current capital justice process as a reason to reject a capital scheme that required a death sentence when aggravating and mitigating evidence were in equipoise) (Souter dissent, joined by Stevens, Ginsburg, and Breyer); Ring v. Arizona, 536 U.S 584, 616 (2002) (emphasizing the continued division of opinion as to whether capital punishment is in all circumstances "cruel and unusual punishment" as currently administered as grounds for requiring jury sentencing in all capital cases) (Breyer concurrence for himself alone).

[79] In 2001, Justice O'Connor criticized the administration of capital punishment on the grounds of wrongful conviction and inadequate provision of defense services. *See* Associated Press, *O'Connor Questions Death Penalty*, N.Y. Times, July 4, 2001. The same year, Justice Ginsburg told a public audience that she

constitutional doctrine that has been so seriously questioned both by its initial supporters and later generations of Justices who have tried in good faith to implement it. Such reservations strongly suggest that the constitutional regulation of capital punishment has not succeeded on its own terms.

The question remains whether the Institute should undertake a new law reform project to ameliorate the consequences of the Supreme Court's unsuccessful regime of constitutional regulation of capital punishment, given that the Institute's prior law reform project in this area (MPC § 210.6) played a role in initiating and shaping the Court's current approach. Militating against such a course of action is the fact that the problems currently afflicting the capital justice process are not addressable in the absence of larger scale political or institutional changes that are either impossible or beyond the scope of an ALI-style law reform project. The scope of these problems – which we survey below – demonstrates that a more appropriate response by the Institute would be the withdrawal of § 210.6 with a statement calling for the rejection of capital punishment as a penal option.

II. The Politicization of Capital Punishment

Perhaps the most important feature of the landscape of capital punishment administration that imperils the success of any discrete law reform project is the intense politicization of the death penalty. Capital punishment (like the rest of criminal justice in the United States) is politicized *institutionally*, in that some or all of the most important actors in the administration of capital punishment are elected (with the exception of lay jurors). At the same time, capital punishment is politicized *symbolically*, in that it looms much larger than it plausibly should in public discourse because of its power as a focus for fears of violent crime and as political shorthand for support for "law and order" policies generally. These two aspects of politicization ensure that the institutional actors responsible for the administration of the capital justice process are routinely subject to intense pressures, which in turn contribute to the array of problems that we review below – e.g., inadequate representation, wrongful convictions, and disparate racial impact. There is little hope of successfully addressing these problems in the absence of profound change on the politicization front.

The vast majority of death penalty jurisdictions within the United States have elected rather than appointed prosecutors, and these prosecutors are usually autonomous decisionmakers in their own small locales (counties). Rarely is there any state or regional review of local decisionmaking or coordination of capital prosecutions. These simple facts of institutional organization generate enormous geographic disparities within most death penalty jurisdictions. In Texas, for example, Dallas County (Dallas) and Harris County (Houston), two counties with similar demographics and crime rates, have had

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supported a state moratorium on the death penalty, noting that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial." Associated Press, *Ginsburg Backs Ending Death Penalty*, Apr. 9, 2001, available at http://www.truthinjustice.org/ginsburg.htm.

very different death sentencing rates, with Dallas County returning 11 death verdicts per thousand homicides, while Harris County returns 19. One sees an even greater disjunction in Pennsylvania between Allegheny County (Pittsburgh) and Philadelphia County (Philadelphia), which have death verdict rates of 12 and 27 per thousand homicides, respectively. In Georgia, another significant death penalty state, the death sentencing rate ranges from 4 death verdicts per thousand homicides in Fulton County (Atlanta) to 33 in rural Muscogee County – a difference of more than 700%. Large geographic variations exist within many other states that are similarly uncorrelated with differences in homicide rates.[80] These geographic disparities are troubling in themselves because they suggest that state death penalty legislation is unable to standardize the considerations that are brought to bear in capital prosecutions so as to limit major fluctuations in its application across the state. But these geographic disparities are also troubling because they may be one of the sources of the persistent racial disparities in the administration of capital punishment in many states. (See section on "Race Discrimination" below.)

In addition, the symbolic politics of capital punishment is very much at play in the election of local prosecutors. Candidates for local district attorney and state attorney general in a wide variety of jurisdictions have run campaigns touting their capital conviction records, even going so far as listing individual defendants sentenced to death.[81] As a practical matter, an elected prosecutor's capital conviction record should be a relatively small part of any prosecutor's portfolio, given the limited number of capital cases that any prosecutorial office will handle – a small fraction of all homicide cases, and an even smaller fraction of all serious crimes. (Remember that even Harris County, Texas, has a death verdict rate of only 1.9% of all homicides). Clearly, many prosecutorial candidates perceive that the voting public has a special interest in capital cases, both because of the fear generated by the underlying crimes that give rise to capital prosecution and because a prosecutor's support for capital punishment represents in powerful shorthand a prosecutor's "toughness" on crime. These general incentives are troubling in themselves, because they suggest that political incentives may exist to bring capital charges and to win death verdicts, quite apart from the underlying merits of the cases.[82] Even more troubling is the incentives that may exist to favor those in a position to provide campaign contributions or votes. The racial disparities in capital charging

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[80] *See generally* James S. Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), available at http://www2.law.columbia.edu/brokensystem2/index2.html.

[81] *See* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 474-75 (1999); Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 Geo. J. Legal Ethics 941 (1994).

[82] The federal system presents a different picture with regard to the problem of political pressures on prosecutors, because federal prosecutors are appointed rather than elected. Moreover, unlike most local district attorneys, federal prosecutors must subject their decisions to seek the death penalty to centralized review by Main Justice. While federal cases may be different in important respects from state cases (in degree of politicization, among other things), the MPC was designed as a state penal code. Thus, any such differences are not relevant to the question of how the Institute should address the capacity of § 210.6 to address the problems common to most state death penalty systems.

decisions favoring cases with white victims mirror the racial disparities in political influence in the vast majority of communities.[83]

Judges as well as prosecutors must face the intense politicization that surrounds the administration of capital punishment. Almost 90% of state judges face some kind of popular election.[84] Politicization of capital punishment in judicial elections has famously ousted Chief Justice Rose Bird and colleagues Cruz Reynoso and Joseph Grodin from the California Supreme Court,[85] as well as Justice Penny White from the Tennessee Supreme Court.[86] These high-profile examples are only the tip of the iceberg of political pressure, as no judge facing election could be unaware of the high salience of capital punishment in the minds of voters, especially in times of rising crime rates or especially high-profile murders. The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, after an official visit to the United States, reported that many of those with whom he spoke in Alabama and Texas, which both have partisan judicial elections, suggested that "judges in both states consider themselves to be under popular pressure to impose and uphold death sentences whenever possible and that decisions to the contrary would lead to electoral defeat."[87]

Of course, there is every hope and reason to expect that most judges will conscientiously endeavor to resist such pressures and decide cases without regard to political influences. Despite the fact that there is good reason to have confidence in the personal integrity of the individual men and women who comprise the elected judiciary, several statistical studies suggest that, in the aggregate, judicial behavior in criminal cases

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[83] The Baldus study on racial disparities in capital sentencing, see *supra* note 33, also found evidence that charging decisions were strongly correlated with the race of murder victims. These statistical findings parallel anecdotal evidence from lawyers in the field. Stephen Bright, Director of the Southern Center for Human Rights in Atlanta, Georgia, describes an incident in a Georgia county: "In a case involving the murder of the daughter of a prominent white contractor, the prosecutor contacted the contractor and asked him if he wanted to seek the death penalty. When the contractor replied in the affirmative, the prosecutor said that was all he needed to know. He obtained the death penalty at trial. He was rewarded with a contribution of $5,000 from the contractor when he successfully ran for judge in the next election. The contribution was the largest received by the District Attorney." Stephen B. Bright, *Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 453-54 (1995). This case was part of a larger pattern of prosecutors meeting the families of white murder victims to discuss the bringing of capital charges, but not with the families of black murder victims. *See id.*

[84] Matthew Streb, *Running for Judge: The Rising Political, Financial and Legal Stakes of Judicial Elections* 7 (2007).

[85] *See* Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 Judicature 365, 367 (1987) (describing television spot that encouraged voters to vote "three times for the death penalty; vote no on Bird, Reynoso, Grodin").

[86] Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 N.Y.U. L. Rev. 308, 314 (1997) (describing opposing party's political add "Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White").

[87] Press Statement, Professor Philip Alston, United Nations Human Rights Council Special Rapporteur on extrajudicial, summary or arbitrary executions, June 30, 2008. A recent political advertisement by a Texas trial court judge reflects the influence of public pressure to return death verdicts. Judge Elizabeth Coker's advertisement offers as the first reason to re-elect her the fact that she "cleared the way for the jury to issue a death sentence" in John Paul Penry's capital murder trial after it had been reversed by the U.S. Supreme Court for a second time. (A copy of the advertisement is on file with the authors.)

generally and capital cases in particular appears to be influenced by election cycles.[88] Moreover, in many jurisdictions, judges not only preside over and review capital trials, they also appoint lawyers, approve legal fees, and approve funding for mitigation and other expert services. These decisions, which are crucial to the capital justice process, are less visible but no less likely to be subject to political pressures.[89] Finally, in a few capital jurisdictions, elected judges actually impose sentences in capital cases through their power to override jury verdicts, and a comparison among these states strongly suggests that the degree of electoral accountability influences the direction of such overrides.[90] One potential avenue for mitigating the effect of political pressure on elected judges was foreclosed when the Supreme Court struck down, on First Amendment grounds, a state law barring a judicial candidate from announcing his or her views on disputed legal or political issues.[91] The Court's decision invalidated laws in nine states, and it has been interpreted broadly by lower courts, who have struck down other limitations on judicial candidates, including those on both fundraising and campaign promises, that were part of the law in many more states.[92]

Governors, too, are influenced by the intense politicization of capital punishment. Like prosecutors and judges, Governors have often campaigned on their support for the death penalty, emphasizing their willingness to sign death warrants.[93] While Governors

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[88] *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?* 48 Am. J. Pol. Sci. 247 (2004) (finding that trial judges standing for re-election tend to impose harsher sentences as elections approach); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. Pol. 427 (1992) (finding that district-based elections influence justices in state supreme courts to join conservative majorities in death penalty cases in Texas, North Carolina, Louisiana, and Kentucky); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360 (2008) (finding that judicial behavior in affirming death sentences is correlated with public opinion about the death penalty only in states where judges face election and not in states where judges are appointed); *but cf.* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465 (1999) (finding no system-wide evidence of the effect of state judicial election methods on capital case outcomes, but finding other evidence confirming the politically charged character of the death penalty in state courts).

[89] For example, defense lawyers in the pool of those seeking appointments to capital cases contributed money to the election and re-election campaigns of judges in Harris County, Texas – the county responsible for the largest number of executions in the United States. *See* Amnesty International, *One County, 100 Executions: Harris County and Texas – A Lethal Combination* 10 (2007), available at http://www.amnesty.org/en/library/info/AMR51/125/2007.

[90] Elected judges in Alabama and Florida have been far more likely to use their power to override jury verdicts to impose death when the jury has sentenced the convicted person to life in prison than to replace a jury verdict of death with one of life. In contrast, judges in Delaware, who do not stand for election, are far less likely to override in favor of death than to override in favor of life. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 793-94 (1995). Moreover, in Alabama, overrides in favor of death have appeared to be more frequent in election years. *See* Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb. L. J. 239, 255-56 (1994).

[91] Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

[92] *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L. J. 1077, 1095-96 (2007).

[93] *See* Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* 71 (2005) (noting examples of John K. Van de Kamp in California, Jim Mattox in Texas, and Bob Martinez in Florida).

are less implicated in the day-to-day workings of the capital justice process than prosecutors and judges, they play a crucial role in the exercise of clemency powers, which the Supreme Court has recognized as an important defense against conviction and execution of the innocent.[94] Some Governors, like George Ryan of Illinois, have not been afraid to use the clemency power to respond to concerns about wrongful conviction. However, the trend in the use of the clemency power in capital cases has been sharply downward in the decades since the reinstatement of capital punishment in 1976, at the same time that the trend in death sentencing and executions has been sharply upward.[95] The persistent high political salience of capital punishment, as reflected by its prominence at all levels of political discourse,[96] has no doubt affected the willingness of Governors to set aside death sentences.[97]

Finally, the politicization of the issue of capital punishment in the legislative sphere limits the capacity of legislatures to promote and maintain statutory reform. The kind of statutory reform that many regard as the most promising for ameliorating arbitrariness and discrimination in the application of the death penalty is strict narrowing of the category of those eligible for capital crimes. Justice Stevens argued that unfettered discretion to grant mercy based on open-ended consideration of mitigating evidence (which is commanded by the constitution) is not fundamentally inconsistent with guided discretion (which is also commanded by the constitution), provided that the category of the death eligible is truly limited to the "tip of the pyramid."[98] And the Baldus study reported that racial disparities were not evident in the distribution of death sentences for the category of the most aggravated murders, because death sentences were so common in this category.[99] A few states, like New York, have managed to maintain a relatively narrow death penalty.[100] However, most states have been unwilling to restrict the scope of the death penalty, and the continued inclusion of broad aggravators like felony murder, pecuniary gain, future dangerousness, and heinousness (or its equivalent) preclude the strict narrowing approach in most jurisdictions.

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[94] See the discussion of Herrera v. Collins, 506 U.S. 390 (1993), in the "Constitutional Regulation" section, *supra* notes 55-59 and accompanying text.

[95] *See* Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from* Gregg *to* Atkins, 33 N.M. L. Rev. 349 (2003).

[96] Even presidential politics is profoundly marked by capital punishment, though the federal government in general, and the President in particular, plays a very small role in the administration of capital punishment, other than through the appointment of Justices to the Supreme Court.

[97] One dramatic example of the political costs of clemency is the 1994 Pennsylvania gubernatorial race between Republican Tom Ridge and Democrat Mark Singel. Singel had been chairman of the state's Board of Pardons, which had released an inmate who was arrested on murder charges a month before the election. Overnight, Singel went from leading Ridge by 4 points to trailing him by 12: Singel's commutation recommendation lost him the election. *See* Tina Rosenberg, *The Deadliest D.A.*, N.Y. Times, July 16, 1995.

[98] See the discussion of Stevens' opinion in Walton v. Arizona, 497 U.S. 639 (1990), in the "Constitutional Regulation" section, *supra* notes 32-36 and accompanying text.

[99] See the discussion of the Baldus study in the section on "Race Discrimination," *infra* at 27-28.

[100] Indeed, New York even refused to re-authorize the penalty after its highest court invalidated the state's death penalty statute on easily remediable state constitutional grounds. But states like New York and New Jersey (the only state to legislatively abolish capital punishment since its reinstatement in 1976) are outliers. They did not participate significantly in the practice of capital punishment in the modern era even while formally retaining the death penalty.

Moreover, even if a jurisdiction were able to pass a truly narrow death penalty (something more likely in an abolitionist jurisdiction reinstating the death penalty than in a retentionist jurisdiction sharply curtailing a current statute), the political pressure to expand the ambit of the death penalty over time will likely prove politically irresistible. The tendency of existing statutes, even already broad ones, to expand over time through the addition of new aggravating factors has been well documented.[101] When former Governor Mitt Romney introduced legislation drafted by a blue-ribbon commission to reinstitute capital punishment in Massachusetts, supporters of the draft emphasized the very narrow ambit of proposed statute. However, a symposium of experts organized to discuss the proposed statute noted the problem of what one of them called "aggravator creep" (an analogy to "mission creep" referred to in military contexts), in which "[a] statute is passed with a list of aggravating factors, and then structural impulses often push that list to become longer and longer as new aggravators are added."[102] The most eloquent case for the inevitability of "aggravator creep" has been made by lawyer and novelist Scott Turow. Turow, a former federal prosecutor who supported the death penalty for most of his life, wrote a (nonfiction) book describing how his later pro bono work on the capital appeal of a wrongfully convicted man and his service on the Illinois Governor's Commission to reform the death penalty convinced him to vote as a Commission member for abolition rather than reform. As a moral matter, Turow remains persuaded that a narrow death penalty is both morally permissible and desirable. But he has come to see that expansion is inevitable, with the arbitrariness and potential for error that expansive capital statutes necessarily entail:

> The furious heat of grief and rage the worst cases inspire will inevitably short-circuit our judgment and always be a snare for the innocent. And the fundamental equality of each survivor's loss, and the manner in which the wayward imaginations of criminals continue to surprise us, will inevitably cause the categories for death eligibility to expand, a slippery slope of what-about-hims.[103]

The foregoing suggests that politicization of the death penalty, both within the capital justice process and more broadly in the realm of public policy and discourse, threatens both the integrity of individual cases and the prospects for reform. This politicization is the most far-reaching, important, and intractable reason to be dubious of the prospects for success of an ALI reform project in this area.

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[101] Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in Austin Sarat, ed., *The Killing State: Capital Punishment in Law, Politics, and Culture* (1999); Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 Pepperdine L. Rev. 1 (2006).

[102] *See Symposium: Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report. Panel One – The Capital Crime*, 80 Ind. L. J. 35, 35 (2005) (statement of Edwin Colfax).

[103] Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* 114 (2003).

III. Race Discrimination

Race discrimination has cast a long shadow over the history of the American death penalty. During the antebellum period, race discrimination was not merely a matter of practice but a matter of law, as many Southern jurisdictions made the availability of the death penalty turn on the race of the defendant or victim.[104] After the Civil War, the discriminatory Black Codes were largely abandoned, but discrimination in the administration of capital punishment persisted. Discrimination permeated both the selection of those to die as well as the selection of those who could participate in the criminal justice process. African Americans were more frequently executed for non-homicidal crimes, were more likely to be executed without appeals, and were more likely to be executed at young ages.[105] Discrimination was most pronounced in Southern jurisdictions. The most obvious discrimination occurred in capital rape prosecutions, as such prosecutions almost uniformly targeted minority offenders alleged to have assaulted white victims, and the numerous executions for rape post-1930 (455) were entirely confined to Southern jurisdictions, border states, and the District of Columbia.[106] Until the early 1960s, the differential treatment of both African-American offenders and African-American victims was attributable in part to the exclusion of African-Americans from jury service, again largely (although not exclusively) concentrated in Southern and border-state jurisdictions.

When the Supreme Court first signaled its interest in constitutionally regulating capital punishment in the early 1960s, several Justices issued a dissent from denial of certiorari indicating their willingness to address whether the death penalty is disproportionate for the crime of rape.[107] Although these Justices did not mention race in their brief statement, they were undoubtedly aware of the racially-skewed use of the death penalty to punish rape. The NAACP Legal Defense Fund thereafter sought to document empirically race discrimination in capital race prosecutions with an eye toward challenging such discrimination in particular cases. The first significant study, produced by Professor Marvin Wolfgang and others at the University of Pennsylvania, found both race-of-the-defendant and race-of-the-victim discrimination in the administration of the death penalty for rape (after controlling for non-racial variables); African-American defendants convicted of raping white females faced a greater than one-third chance of receiving a death sentence whereas all other racial combinations yielded death sentences in about two percent of cases.[108]

The Wolfgang study did not ultimately lead to success in litigation, and the Eighth Circuit's rejection of the study as a basis for constitutional relief, authored by then-Judge Blackmun – foreshadowed the Supreme Court's subsequent denial of relief in *McCleskey*,

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[104] Stuart Banner, *The Death Penalty: An American History* (2002).
[105] William J. Bowers, *Legal Homicide: Death as Punishment in America, 1864-1982*, 67-87 (1984).
[106] Marvin E. Wolfgang, *Race Discrimination in the Death Sentence for Rape*, in William J. Bowers, *Executions in America* 113 (1974).
[107] Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (Goldberg, J., joined by Douglas and Brennan, JJ., dissenting from denial of certiorari).
[108] Wolfgang, *supra* note 106, at 117 (Table 4-2).

discussed above.[109] In particular, the judicial response to the statistical demonstration of discrimination was to insist on a showing by the defendant of improper racial motivation in *his* case, a requirement that insulates widespread discriminatory practices from meaningful judicial intervention. But the Wolfgang study did contribute to the accurate perception that the prevailing administration of the death penalty was both arbitrary and discriminatory, and thus contributed to *Furman*'s invalidation of existing statutes and the "unguided" discretion they entailed.

The central question today is whether efforts to guide sentencer discretion – such as the one embodied in the MPC death-sentencing provision – successfully combat the sort of discrimination reflected in the Wolfgang study. The current empirical assessment is "no" – that race discrimination still plagues the administration of the death penalty, though the evidence suggests that race-of-the-victim discrimination is of a much greater magnitude than race-of-the defendant discrimination. The more difficult question is whether the persistent role of race in capital decisionmaking can be significantly reduced or eradicated, whether through statutory efforts to narrow the reach of the death penalty or other means.

The Baldus study, described above, found that defendants charged in white-victim cases, on average, faced odds of receiving a death sentence that were 4.3 times higher than the odds faced by similarly situated defendants in black-victim cases.[110] Other studies have similarly pointed to a robust relationship between the race of the victim and the decision to seek death and to obtain death sentences (also controlling for non-racial variables). Leigh Bienen produced a study of the New Jersey death penalty that reflected greater prosecutorial willingness to seek death in white victim cases.[111] Baldus, et al, studied capital sentences in Philadelphia and found both race-of-the-victim and race-of-the-defendant discrimination.[112] Given the remarkably different histories and demographics of Philadelphia and Georgia, it is surprising that the Philadelphia study found a magnitude of race-of-the-victim effects quite similar to the magnitude found in the Georgia study addressed in *McCleskey*. A federal report issued in 1990, which summarized the then-available empirical work on the effects of race in capital sentencing (28 studies), likewise found consistent race-of-the-victim effects (in 82% of the studies reviewed), particularly in prosecutorial charging decisions.[113]

Apart from these statistical studies, a broad scholarly literature often highlights American racial discord as an important explanatory variable of American exceptionalism with respect to capital punishment – the fact that the United States is alone among Western democracies in retaining and actively implementing the death

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[109] Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).
[110] *See* Part I, *supra*, at p. 13-14.
[111] Leigh Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 Rutgers L. Rev. 27 (1988).
[112] David Baldus, et al., *Race Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Finding from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).
[113] U.S. General Accounting Office, Death Penalty Sentencing (Feb. 1990).

penalty.[114] Such works point to the fact that executions are overwhelmingly confined to the South (and states bordering the South), the very same jurisdictions that were last to abandon slavery and segregation, and that were most resistant to the federal enforcement of civil rights norms.

Professor Frank Zimring, in his recent broad assessment of the American death penalty, argued that the regional persistence of "vigilante values" strongly contributes to American retention of capital punishment.[115] Many scholars have speculated that contemporary state-imposed executions might serve a role similar to extralegal executions of a previous era, and Zimring observes that "the substantive core of the support for death as a penalty seems to be an ideology of capital punishment as community justice that appears most intensely today in these areas where extreme forms of vigilante justice thrived in earlier times."[116] A recent article in the American Sociological Review presents empirical data supporting the claim that current death sentences might be linked to such vigilante values.[117] The authors report a positive relationship between death sentences, "current racial threat" (reflected in the size of a jurisdiction's African-American population), and "past vigilantism" (reflected in past lynching activity). The authors conclude that: "our repeated findings that this relationship is present support claims that a prior tradition of lethal vigilantism enhances recent attempts to use the death penalty as long as the threat posed by current black populations is sufficient to trigger this legal but lethal control mechanism."[118]

Supporters of the death penalty would certainly resist the claim that the death penalty remains in place *because of* underlying conscious or unconscious racial prejudice. Moreover, the high level of executions in Southern jurisdictions correlates not only with racial factors (such as past race discrimination and contemporary racial tensions) but also with other potential explanatory factors such as high rates of violent crime and the prevalence of fundamentalist religious beliefs. Some empirical literature, though, modestly supports the claim that racially discriminatory attitudes may account for some of the contemporary support for the death penalty.[119]

The most significant efforts to reduce the effect of race in capital proceedings have focused on narrowing the class of death eligible offenses and guiding sentencer

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[114] Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (2005).
[115] Franklin E. Zimring, *The Contradictions of American Capital Punishment* (2003).
[116] *Id.* at 136.
[117] David Jacobs, et al., *Vigilantism, Current Racial Threat, and Death Sentences,* 70 Amer. Soc. Rev. 656 (2005).
[118] *Id.* at 672
[119] Several empirical studies have explored the subtle role of race discrimination in death penalty attitudes. *See, e.g.,* Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. of Research in Crime & Delinquency 202 (1994) (reporting empirical study in which two indexes of racial prejudice were significantly linked to greater support for the death penalty among whites, even after controlling for relevant demographic and attitudinal variables); Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 Social Psychology Quarterly 67 (1991) (empirical analysis finding that racial prejudice significantly predicts both support for the death penalty and tougher crime control policies).

discretion at the punishment phase of capital trials. The first solution – restricting the death penalty to the most aggravated cases – appears promising, because the Baldus study found that race effects essentially disappear in such cases given the very high frequency of death sentences in that range (in the eighth category of cases within the study, with the most aggravation, jurors imposed the death penalty 88% of the time[120]). Indeed, the MPC death sentencing provision could be viewed as one such effort to narrow the death penalty because it requires a finding of an aggravated factor (beyond conviction for murder) to support the imposition of death.

The problem, though, played out over the past thirty years, is that no state has successfully confined the death penalty to a narrow band of the most aggravated cases. Death eligibility in prevailing statutes remains breathtakingly broad, as aggravating factors or their functional equivalent often cover the spectrum of many if not most murders. The MPC provision is representative in this regard, allowing the imposition of death based on any of eight aggravating factors, including murders in the course of several enumerated felonies,[121] and any murder deemed "especially heinous, atrocious or cruel, manifesting exceptional depravity."[122] One reading of the MPC provision is that it excludes only those murders of "ordinary" heinousness, atrociousness, cruelty, or depravity, and prosecutors and especially jurors might be reluctant to deem any intentional deprivation of human life as "ordinary" along those dimensions.

The failure to achieve genuine narrowing is partly a matter of political will in light of the constant political pressure to expand rather than restrict death eligibility in response to high-profile offenses (consider the expansion of the death penalty for the crime of the rape of a child). But the failure also stems from the deeper problem identified by Justice Harlan (discussed above), that it remains an elusive task to specify the "worst of the worst" murders in advance. Any rule-like approach to narrowing death eligibility will require jettisoning factors such as MPC's "especially heinous" provision; but those factors often capture prevailing moral commitments – some offenses are appropriately regarded as among the very worst by virtue of their atrociousness, cruelty, or exceptional depravity. At the same time, many objective factors taken in isolation seem appropriately narrow (such as MPC §210.6(3)(c), the commission of an additional murder at the time of the offense), but collectively these factors establish a broad net of death eligibility. The breadth of death eligibility in turn invites and requires substantial discretion, particularly in prosecutorial charging decisions, which permits racial considerations to infect the process.

The prospect of a meaningful legislative remedy to address race discrimination seems quite remote. After *McCleskey*, legislative energies were directed toward fashioning a response to the discrimination reflected in the Baldus study. At the federal level, the Racial Justice Act, which would have permitted courts to consider statistical data as evidence in support of a claim of race discrimination within a particular jurisdiction, repeatedly failed to find support in the U.S. Senate. Many state legislatures

[120] *McCleskey*, 481 U.S. at 325 n.2 (Brennan, J., dissenting).
[121] §210.6(3)(e).
[122] §210.6(3)(h).

have considered similar legislation (including Georgia, Illinois, and North Carolina), but to date only Kentucky has enacted such a provision. The Kentucky provision, like the failed federal bill, allows a defendant to use statistical data to establish racial bias in the decision to seek death, though the question remains whether racial bias likely contributed to the decision to seek death *in the defendant's case.*[123] To date, no death-sentenced inmate in Kentucky or elsewhere has had his death sentence reversed on such grounds.

Apart from its lack of political appeal, racial justice legislation seems inadequately suited to address the problems reflected in the empirical data. On a practical level, the numerous variables involved in particular cases make it difficult to demonstrate racial motivation or bias at the individual level, even if such discrimination is evident in the jurisdiction as a whole. Introducing evidence of system-wide bias might cause a court to look more closely at the facts surrounding a particular prosecution (especially with a burden-shifting provision), but the sheer "thickness" of the facts in a particular prosecution will likely permit courts to find inadequate proof of bias in case after case. Indeed, racial justice legislation risks legitimating capital systems that are demonstrably discriminatory by ostensibly providing a remedy when in fact none is forthcoming. More broadly, the litigation focus of racial justice acts fails to address the underlying problems. Many of the most troublesome cases in which race influenced prosecutorial or jury decisionmaking are those in which no death sentence was sought or obtained because of the minority status of the victim. Courts are (appropriately) powerless to compel decisionmakers to produce death sentences in such cases, and the troubling differential treatment is irremediable. Notwithstanding their increased political participation generally, minorities remain significantly underrepresented in the two roles that might make a difference: as capital jurors[124] and as elected district attorneys.[125] The combined influences of discretion, underrepresentation, historical practice, and conscious or unconscious bias, make it extraordinarily difficult to disentangle race from the administration of the American death penalty.

IV. Jury Confusion

Another significant post-*Furman* effort to solve the problem of arbitrariness and discrimination has been to impose structure and order on the ultimate life-death decision. The universal adoption of bifurcated proceedings – with a punishment phase focused

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[123] The Kentucky provision states: "No person shall be subject to or given a sentence of death that was sought on the basis of race. . . . A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought." Ky. Rev. Stat. Ann. § 252.3 (2001).

[124] Empirical research has found a strong association between life verdicts and the presence of at least one African-American male on the jury in capital cases involving African-American defendants and white victims. William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 192 Table 1 (2001) (asserting "black male presence effects").

[125] *See* Jeffrey Pokorak, *Probing the Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors,* 83 Cornell L. Rev. 1811 (1998) (discussing significance of underrepresentation of racial minorities as District Attorneys).

solely on whether the defendant deserves to die – was embraced in hopes of producing reasoned moral decisions rather than impulsive, arbitrary, or discriminatory ones. In this respect, the post-*Furman* experiment has been focused on rationalizing the death sentencing process through a combination of statutory precision and focused jury instructions. Such provisions would precisely enumerate relevant aggravating and mitigating factors and carefully explain burdens of proof, the role of mitigation, inappropriate bases for decision (e.g., "mere sympathy"), and the process for reaching a final decision.

As noted above, the *constitutional* requirements respecting states' efforts to channel sentencer discretion are quite minimal. Indeed, once states have ostensibly "narrowed" the class of death-eligible defendants via aggravating circumstances, states need not provide any additional guidance to sentencers as they make their life-or-death decision.[126] The central question as a matter of policy and practice is whether the post-*Furman* experiment with guided discretion has resulted in improved and more principled decisionmaking. The available empirical evidence – largely developed by the Capital Jury Project (CJP) – is discouraging along these lines.

Over the past eighteen years, the CJP has collected data from over a thousand jurors who served in capital cases with the goal of understanding the decision-making process in capital cases. CJP interviewers spent hours with individual jurors exploring the factors contributing to their decisions and their comprehension of the capital instructions in their cases. The CJP designed its questions to determine whether the intricate state capital schemes adopted post-*Furman* actually reduce arbitrariness in capital sentencing by controlling sentence discretion. Dozens of scholarly articles have been published based on the CJP data, and much of the research has documented the failure of jurors to understand the guidance embodied in the sentencing instructions and verdict forms they receive.[127] By collecting data from numerous jurisdictions (fourteen states), the CJP project has been able to identify not only idiosyncratic defects in particular state statutes but endemic flaws in jury decisionmaking, such as the propensity of jurors to decide punishment during the guilt-innocence phase of the trial,[128] their frequent misapprehension of the standards governing their consideration of mitigating evidence,[129] and their general moral disengagement from the death penalty decision.[130]

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[126] *See, e.g.,* Zant v. Stephens, 462 U.S. 862 (1983).

[127] *See, e.g.,* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 Brooklyn L. Rev. 1011 (2001); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); William J. Bowers, Marla Sandys, & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

[128] *See, e.g.,* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043, 1089-90 (1995).

[129] *See, e.g.,* Bentele & Bowers, *supra* note 127, at 1041 (suggesting that mitigating evidence plays a "disturbingly minor role" in jurors' deliberations in capital cases across jurisdictions).

[130] *See, e.g.,* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 Stan. L. Rev. 1447 (1997) (describing how prevailing capital sentencing

Jurors tend to misunderstand the consequences of a life-without-possibility-of-parole verdict, and, in jurisdictions that permit the alternative of a life-with-parole verdict, jurors consistently underestimate the length of time a defendant will remain in prison if not sentenced to death.[131] A significant number of jurors serve in capital cases notwithstanding their unwillingness to consider a life verdict,[132] and many jurors who have served on capital trials simply are unable to grasp the concept of mitigating evidence.[133] Other findings of the CJP point to the skewing of capital juries through death-qualification,[134] the significance of the racial composition of the jury in capital decisionmaking,[135] and the particular problems posed in jurisdictions (such as Florida and Alabama) where juries and judges share responsibility for capital verdicts.[136]

The empirical findings of the CJP are disheartening because they reflect widespread, fundamental misunderstanding on the part of capital jurors. Perhaps some of the findings can be discounted by the fact that the jurors' explanations of their role and the governing law were offered well after their actual jury service (and perhaps the jurors' understanding of their sentencing instructions at the time of interviews did not correspond perfectly to their understanding of the instructions at the time of their deliberations). But even a superficial review of instructions given in capital cases today reveals the unnecessary technical complexity of prevailing practice.[137] Jurors are told about the role of aggravating factors, their ability (in many jurisdictions) to consider non-statutory aggravators, the role of mitigation, and so on. They are then asked to weigh or balance aggravation against mitigation or to decide whether mitigating factors are sufficiently substantial to call for a sentence less than death.

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practices assist jurors in overcoming their resistance to imposing the death penalty in part by diminishing their sense of responsibility for their verdict).

[131] John H. Blume, et al., *Lessons from the Capital Jury Project*, in *Beyond Repair? America's Death Penalty* 167 (Stephen Garvey, ed. 2003); *see also* Theodore Eisenberg, et al., *The Deadly Paradox of Capital Jurors*, 74 S. Cal. L. Rev. 371 (2001) (discussing jurors' misperceptions about the meaning of life sentences).

[132] Blume, et al., *supra* note 131, at 174.

[133] Craig Haney, *Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223, 1229 (1995) (reporting that "less than one-half of our subjects could provide even a partially correct definition of the term 'mitigation,' almost one-third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in 10 was still so mystified by the concept that he or she was unable to venture a guess about its meaning") (citing Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 Law & Hum. Behav. 411, 420-21 (1994)).

[134] *See, e.g.,* Marla Sandys and Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *America's Experiment with Capital Punishment*, James Acker, et al., ed.(2nd ed. 2003).

[135] Bowers, et al., *supra* note 124.

[136] Wanda D. Foglia and William J. Bowers, *Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making*, 42 Crim. L. Bulletin 663 (2006).

[137] In Alabama, for example, the allocation of burden regarding proof of mitigating circumstances is explained as follows: "[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence." Ala. Code § 13A-5-45(g).

These sorts of efforts to tame the death penalty decision do not necessarily ensure more principled or less arbitrary decisionmaking. Casting the decision in terms of "aggravation" and "mitigation" and requiring jurors to "balance" or "weigh" these considerations might falsely convey to the jurors that their decision is a mechanical or mathematical one, rather than one requiring moral judgment. As one commentator lamented, "giv[ing] a 'little' guidance to a death penalty jury" poses the risk that "jurors [will] mistakenly conclude[] that they are getting a 'lot' of guidance" thus diminishing "their personal moral responsibility for the sentencing decision."[138]

More fundamentally, the problem identified by Justice Harlan in *McGautha* casts a shadow over any effort to rationalize the decision whether to impose death. In many jurisdictions, jurors are permitted to consider both statutory and non-statutory aggravating factors (including victim impact evidence), making the grounds for their ultimate decision virtually limitless. At the same time, every jurisdiction – responding to the Supreme Court's direction – currently permits unbridled consideration of mitigating factors, which likewise undercuts any effort to structure the death penalty decision. In the thirty-five or so years of constitutional regulation since *Furman*, states have reproduced the open-ended discretion of the pre-*Furman* era, but have packaged it in the guise of structure and guidance. In the absence of *substantive* limits on sentencer discretion, the complicated and confusing *procedural* means of implementing that discretion cannot reduce arbitrary or discriminatory decisionmaking. It can only obscure the jury's current responsibility for deciding, essentially on any criteria, whether a defendant should live or die. In this respect, reform of contemporary capital statutes should focus on reducing complexity and communicating clearly the sentencer's awesome obligation to make an irreducible moral judgment about the defendant's fate. The states' failure to make such reforms is largely attributable to their misguided belief that the complicated overlay of instructions is somehow constitutionally compelled. It is also partly attributable to the fact that such reform efforts – and the return to the pre-*Furman* world that they would represent – would amount to a concession that Justice Harlan was right: that statutory efforts (like the MPC death-sentencing provision) are likely unable to reduce the arbitrary imposition of the death penalty.

V. The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases

Capital prosecutions are expensive. A number of studies have tried to ascertain the relative expense of capital prosecutions vis-a-vis non-capital prosecutions, using a variety of methodologies.[139] What emerges from these studies is a consensus that capital

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[138] Joseph L. Hoffman, *Where's the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases,* 70 Ind. L.J. 1137, 1159 (1995).

[139] *See, e.g.,* 2008 study of "The Cost of the Death Penalty in Maryland" by the Urban Institute; 2008 study of "The Hidden Death Tax: The Secret Costs of Seeking Execution in California," by the ACLU of Northern California; 2006 study by the Death Penalty Subcommittee of the Committee on Public Defense of the Washington State Bar Association (no title); 2004 study of "Tennessee's Death Penalty: Costs and Consequences," by Comptroller of the Treasury; 2003 Study of "Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections" by the Legislative Division of Post Audit, State of

prosecutions generate higher costs at every stage of the proceedings, and that the total costs of processing capital cases are considerably greater than those of processing non-capital cases that result in sentences of life imprisonment (or other lengthy prison terms), even when the costs of incarceration are included. Although the data are often incomplete or difficult to disaggregate, it appears that the lion's share of additional expenses occur during the trial phase of capital litigation, as a result of a longer pre-trial period, a longer and more intensive voir dire process, longer trials, more time spent by more attorneys preparing cases, more investigative and expert services, and an expensive penalty phase trial that does not occur at all in non-death penalty cases. Appellate and especially post-conviction costs are also considerably greater than in non-capital cases, though they tend to make up a smaller share of the total expense of capital litigation.

Despite the very large costs that are currently incurred in the administration of capital punishment, there is also good reason to believe that the capital process remains substantially under-funded, especially in the area of defense counsel services. The best reference point for what constitutes minimally adequate defense counsel services in capital cases has been provided by the American Bar Association. The ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, offer specific guidance on such matters as the number and qualifications of counsel necessary in capital cases, the nature of investigative and mitigation services necessary to the defense team, and the performance standards to which the defense team should be held. The *Guidelines* also instruct about the need for a "responsible agency" (such as a Public Defender organization or its equivalent) to recruit, certify, train and monitor capital defense counsel. In addition, there are separate Guidelines regarding the appropriate training for capital counsel, the need to control capital defense caseloads, and the need to ensure compensation at a level "commensurate with the provision of high quality legal representation."[140] The Supreme Court has repeatedly endorsed the ABA's performance standards for capital defense counsel as a key benchmark for assessing the reasonableness of attorney performance in a series of recent cases addressing claims of ineffective assistance of counsel in capital cases.[141]

Nonetheless, it is obvious that the vast majority of states do not comply with the ABA *Guidelines*, and many do not come even close. In response to concerns about the lack of fairness and accuracy in the capital justice process, the ABA called in 1997 for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. In 2001, the ABA created the Death Penalty Moratorium Implementation Project, which in 2003 decided to examine several states' death penalty systems to determine the extent to which they achieve fairness and provide due process. Among

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Kansas; 2003 "Study of the Imposition of the Death Penalty in Connecticut" by the Connecticut Commission on the Death Penalty; 2002 study of "The Application of Indiana's Capital Sentencing Law," by the Indiana Criminal Law Study Commission; 2001 "Case Study on State and County Costs Associated with Capital Adjudication in Arizona" by the Williams Institute.

[140] Guideline 9.1B

[141] *See Williams*, 529 U.S. at 396 (citing ABA Standards for Criminal Justice); *Wiggins*, 539 U.S. 510 (citing 1989 ABA death penalty Guidelines); *Rompilla*, 545 U.S. 374 (citing 1989 and 2003 death penalty Guidelines).

other things, the Project specifically investigated the extent to which the states were in compliance with the ABA *Guidelines* for capital defense counsel services. The first set of assessments were published near the end of 2007, and the record of compliance with the ABA *Guidelines* was extremely low: of the 8 states studied,[142] not a single state was found to be fully "in compliance" with any aspect of the ABA *Guidelines* studied. For the 5 guidelines that were studied over the 8 states, there were 15 findings of complete noncompliance and 23 findings of only partial compliance (in 2 cases, there was insufficient information to make an assessment).

For example, the assessment described Alabama's indigent defense system as "failing" due to the lack of a statewide indigent defense commission, the minimal qualifications and lack of training of capital defense counsel, the failure to ensure the staffing required by the Guidelines (2 lawyers, an investigator, and a mitigation specialist), the failure to provide death-sentenced inmates with appointed counsel in state post-conviction proceedings, and the very low caps on compensation for defense services.[143] While Alabama had the worst record of compliance among the states studied, Indiana had the best record. Nonetheless, the Project founded that Indiana, too, "falls far short of the requirements set out in the ABA *Guidelines*." In particular, the report pointed to inadequate attorney qualification and monitoring procedures, unacceptable workloads, insufficient case staffing, and lack of an independent appointing authority (such as a Public Defender office). Indiana is not alone in this latter failing, as fewer than 1/3 of the 36 states that currently retain the death penalty have statewide capital defense systems as called for by the ABA.[144]

The 2003 revisions to the ABA *Guidelines* insist that the Guidelines are not "aspirational" but rather are the minimum necessary conditions for the operation of the capital justice process in a fashion that adequately guarantees fairness and due process. Unfortunately, the record of compliance with the Guidelines even among the states most committed to providing adequate defense services remains poor. New York, which provided for generous levels of capital defense funding when it reinstated capital punishment in 1995, slashed that allocation by almost a third three years later, and then maintained funding at the reduced rate until its capital statute was judicially invalidated in 2004.[145] When the New York State Assembly held hearings that year on whether to again reinstate the death penalty, experts warned that the invalidated statute failed to comply with the ABA *Guidelines* for the appointment of counsel in postconviction proceedings.[146] The record of state compliance with the *Guidelines* overall suggests that the states agree with the ABA that the *Guidelines* are not aspirational – not because the

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[142] The 8 states assessed by the ABA Moratorium Implementation Project were Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. The reports are available at http://www.abanet.org/moratorium/.

[143] The caps for capital defense services in Alabama are $2,000 for direct appeal, and $1,000 for state post-conviction proceedings.

[144] *See* Shaila Dewan, *Executions Resume, as Do Questions of Fairness*, N.Y. Times, May 7, 2008.

[145] James R. Acker, *Be Careful What You Ask For: Lessons from New York's Recent Experience with Capital Punishment*, 32 Vermont L. Rev. 683, 752 (2008).

[146] *Id.*

states believe that they are required, but rather because they simply do not aspire to meet them.

Failure to meet (or even to aspire to meet) the ABA *Guidelines* should not necessarily be written off as simple intransigence. The costs involved in providing the resources necessary for a minimally fair capital justice process can be staggering. Instructive in this regard is the Brian Nichols prosecution in Atlanta. Nichols was charged in a 54-count indictment for an infamous courthouse shooting and escape that killed a judge, a court reporter, a sheriff's deputy, and a federal agent. In the investigative stage of the case, Nichols' appointed counsel quickly generated costs totaling $1.2 million, wiping out Georgia's entire indigent defense budget and requiring the postponement of the trial.[147] Note that this price tag covered only the early investigative costs and did not include the costs of Nichols' trial or the years of appellate and post-conviction costs that will follow if a death sentence is imposed (note: Nichols has been convicted and the sentencing phase is ongoing as of this writing, Nov. 20, 2008). The provision of the resources necessary for fair capital trials and appeals may simply not be possible, or at least not possible without substantial diversion of public funds from other sources – something state legislatures have shown themselves again and again unwilling to do in the context of providing indigent defense services. Moreover, when excellent defense services are provided to capital defendants at every stage of the criminal process, the process may become endlessly protracted. As Frank Zimring has most aptly observed, "A nation can have full and fair criminal procedures, or it can have [a] regularly functioning process of executing prisoners; but the evidence suggests it cannot have both."[148]

The ABA's Moratorium Implementation Project should sound two significant cautionary notes for the ALI. First, the ABA has already done the important work of promulgating norms and standards for the capital justice process. After a great deal of study, reflection, and consultation with experts, the ABA has made comprehensive and sensible recommendations for the reform of capital sentencing proceedings, and there seems little that an ALI study could usefully add. Second, even if the ALI came up with different or additional reform proposals, the lack of resources or the political will to generate the necessary resources stands in the way of any substantial reform of the capital justice process. The widespread failures to adequately fund defense counsel services, which are foundational for the implementation of most other reforms, should make the ALI dubious of the prospects for success of a large-scale law reform project in this area.

VI. Erroneous Conviction of the Innocent

Although there is debate about what constitutes a full "exoneration," it is beyond question that public confidence in the death penalty has been shaken in recent years by

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[147] *See* Shaila Dewan & Brenda Goodman, *Capital Cases Stalling as Costs Grow Daunting*, N.Y. Times, Nov. 4, 2007.

[148] Franklin E. Zimring, *Postscript: The Peculiar Present of American Capital Punishment*, in Stephen P. Garvey, ed., *Beyond Repair? America's Death Penalty* 228 (2003).

the number of people who have been released from death row with evidence of their innocence. The Death Penalty Information Center, an anti-death penalty organization, keeps a list of exonerated capital defendants that now totals 129 for the years since 1973.[149] While it is difficult to extrapolate from the number of known exonerations to the "real" rate of wrongful convictions in capital cases (for the same reason that it is difficult to extrapolate from the number of professional athletes who test positive for steroids to the rate of steroid use among athletes), reasonable estimates range from 2.3% to 5%.[150]

Because exonerations of death-sentenced prisoners are such dramatic events, they have generated extensive study of the causes of wrongful convictions, in capital cases and more generally. There is widespread consensus about the primary contributors to wrongful convictions: eyewitness misidentification; false confessions; perjured testimony by jailhouse informants; unreliable scientific evidence; suppression of exculpatory evidence; and inadequate lawyering by the defense.[151] Professor Samuel Gross of Michigan has studied wrongful convictions in both capital and non-capital cases, and he has made a convincing case that erroneous convictions occur disproportionately in capital cases because of special circumstances that affect the investigation and prosecution of capital murder. These circumstances include pressure on the police to clear homicides, the absence of live witnesses in homicide cases, greater incentives for the real killers and others to offer perjured testimony, greater use of coercive or manipulative interrogation techniques, greater publicity and public outrage around capital trials, the "death qualification" of capital juries which makes such juries more likely to convict, greater willingness by defense counsel to compromise the guilt phase to avoid death during the sentencing phase, and the lessening of the perceived burden of proof because of the heinousness of the offense.[152]

In light of the well-known causes of wrongful convictions and the great public concern that exonerations generate, especially in capital cases, one might expect that this would be an area in which remedies should be relatively easy to formulate and achieve without much resistance in the judicial or legislative arenas. In fact, remedies have proven remarkably elusive, despite the clarity of the issues and degree of public sympathy. First, it did not prove easy for those who were eventually exonerated by DNA to get access to DNA evidence or to get relief even *after* the DNA evidence excluded them as the perpetrators of the crimes for which they were convicted. A recent study of

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[149] For inclusion on DPIC's innocence list, a defendant must have been convicted and sentenced to death, and subsequently either: a) their conviction was overturned AND i) they were acquitted at retrial or ii) all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence. *See* http://deathpenaltyinfo.org/node/70.

[150] *See* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases* (forthcoming 2008 J. Empirical Legal Stud.); Samuel R. Gross, *Convicting the Innocent* (forthcoming 2008 Ann. Rev. L. & Soc. Sci.); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate* 97 J. Crim. L. & Criminology 761 (2007).

[151] The Innocence Project at Cardozo Law School tracks the causes of wrongful conviction in cases of DNA exonerations. *See* http://www.innocenceproject.org/understand/.

[152] *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 Buff. L. Rev. 469 (1996).

the first 200 people exonerated by post-conviction DNA testing revealed that approximately half of them were refused access to DNA testing by law enforcement, often necessitating a court order. After being exonerated by DNA evidence, 41 of the 200 required a pardon, usually because they lacked any judicial forum for relief, and at least 12 who made it into a judicial forum were denied relief from the courts despite their favorable DNA evidence.[153]

Second, these early difficulties cannot be written off as preliminary kinks that have been worked out of the system. While the vast majority of states have now passed legislation requiring greater preservation of and access to DNA evidence, the ABA Moratorium Implementation Project's recent assessment of 8 death penalty states included an assessment of how well these states were complying with the ABA's recommendations regarding preservation of and access to biological evidence, and the provision of written procedures, training and disciplinary procedures for investigative personnel. As in the context of the provision of defense counsel services, findings of complete non-compliance or only partial compliance with the ABA's recommendations were commonplace, while full compliance was rare. Similar resistance can be found to implementing reforms aimed at preventing some of the most common causes of wrongful conviction, such as videotaping police interrogations to prevent false confessions, changing photo identification procedures to avoid misidentification, subjecting jailhouse snitch testimony to greater pretrial scrutiny, and performing external independent audits of crime labs. Resistance to providing adequate funding for capital defense services has already been documented above,[154] and the failure of defense lawyers to challenge misidentifications, false confessions, and unreliable scientific evidence has been an important element in the generation of wrongful convictions.

This resistance has a variety of causes. Some law enforcement groups resist changes in investigative procedures with which they have been comfortable, such as interrogations and identification procedures. Moreover, they may oppose proposals for greater monitoring and disciplining of investigative personnel because they fear that misunderstandings may lead to misuse of such procedures. Some reforms are expensive, such as investing in the infrastructure for reliable preservation of biological material, while others promise to be too open-ended in the resources that they might require, such as improving defense counsel services.

Once again, as in the provision of adequate defense counsel services, there is not very much question about the general types of improvements that would be helpful in reducing wrongful convictions; rather, there appears to be an absence of political will to implement them (or to do so in an expeditious fashion). Moreover, a number of the factors catalogued by Samuel Gross that render capital prosecutions more prone to error are simply inherent in the nature of capital crimes and not obviously subject to amelioration by changing the capital justice process. These circumstances militate against the undertaking of a reform project by the ALI and support the suggestion that the ALI instead call for the rejection of capital punishment as a penal option.

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[153] *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008).
[154] See discussion in "Resources" section, *supra* at 34-37.

VII. Inadequate Enforcement of Federal Rights

The preceding sections discuss the limits of constitutional regulation of the death penalty to counter many of the institutional and structural challenges of the American death penalty. Some of the challenges are simply beyond the reach of courts and "law," such as the difficulties described above in guiding sentencer discretion and combating the influence of race in discretionary decisionmaking; other institutional problems, such as the inadequate level of resources at capital trials and the failure to safeguard against wrongful convictions, require the involvement and leadership of political branches. The constitutional edifice that remains secures only limited benefits, and, regrettably, those limited benefits are frequently undermined by inadequate enforcement mechanisms, particularly the stringent limitations on the availability of federal habeas review of state capital convictions.

Over the past three decades, coinciding with the Court's inauguration of constitutional regulation of the death penalty, the availability of federal habeas review has been sharply curtailed. The initial limitations were Court-crafted, but they were followed by the most significant statutory revision of federal habeas in American history, the adoption of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The net effect of these judicial and statutory refinements has been to dilute the limited constitutional protections that the Court has developed.

The case for strong federal habeas review of state criminal convictions is rooted in experience. During the early part of the 20th century, state trial courts, especially in the South, often made little pretense of ensuring basic fairness, and state appellate courts appeared more than willing to ratify those truncated proceedings. After the infamous denial of habeas relief to Leo Frank,[155] whose mob-dominated murder trial led to his death sentence despite his likely innocence, the Court granted habeas relief to five African Americans who had been convicted of murder and sentenced to death following a race riot in Arkansas.[156] The Arkansas case illustrated the potential for state hostility to federal rights: the five defendants were represented by a single lawyer who never consulted with them, and the forty-five minute trial before an all-white jury, in front of an angry white mob, included no defense motions, witnesses, or defendant testimony.[157] As the Court extended most of the constitutional criminal protections in the Bill of Rights to state criminal defendants in the 1950s and 1960s, the Court adjusted the scope of federal habeas as well. Perceived state court hostility to federal constitutional protections, especially those rights newly-recognized and extended to state proceedings, led the Court to expand the federal habeas forum and to relax procedural barriers to federal review of federal claims.

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[155] Frank v. Mangum, 237 U.S. 309 (1915).
[156] Moore v. Dempsey, 261 U.S. 86 (1923).
[157] Larry W. Yackle, *Capital Punishment, Federal Courts, and the Writ of Habeas Corpus,* in *Beyond Repair? America's Death Penalty* 65 (Stephen Garvey, ed. 2003).

Beginning in the1970s, though, the availability of federal habeas review was significantly limited. Most importantly, the Court tightened the federal enforcement of defaults imposed in state court, so that the failure of state inmates to preserve federal claims within state court forecloses later consideration of those claims in federal court as well – with extremely narrow exceptions.[158] Strict enforcement of state procedural default rules has significantly limited the effectiveness of the federal forum. Indeed, some courts have even applied stringent default rules against fundamental claims of excessive punishment – including the prohibition against executing persons with mental retardation.[159] The enforcement of procedural defaults in this context means, as a practical matter, that the execution of all persons with mental retardation is not constitutionally prohibited; the prohibition extends only to those persons with mental retardation who have successfully navigated state procedural rules and preserved their claim for state or federal review. In this respect, limitations on the availability of federal habeas review promote misconceptions about prevailing capital practices; the public is likely to believe that the Court's decisions announcing absolute prohibitions – such as the *Atkins* exemption – effectively end the challenged executions, whereas the reality is more qualified and complicated.

The near blanket prohibition against litigating claims defaulted in state proceedings encourages state courts to resolve claims on procedural grounds, and state courts have occasionally imposed defaults opportunistically to deny enforcement of the federal right. Moreover, strict enforcement of defaults in federal courts is particularly troublesome in cases involving claims defaulted on state postconviction review (typically claims alleging ineffective assistance of counsel at trial or prosecutorial misconduct). As noted above, because state inmates have no constitutional right to counsel on state habeas, they have no right to *effective* assistance of counsel in that forum. Ordinarily, in cases involving attorney error at trial, the one avenue for reviving a procedural defaulted claim is for the inmate to demonstrate that he had been denied constitutionally adequate representation; but if the attorney error occurs on state habeas, the inmate is held to his attorney's mistakes and cannot seek relief under the Sixth Amendment. Given the inadequate resources and monitoring of state postconviction counsel, it is not uncommon for death-sentenced inmates to forfeit substantial claims on state habeas, and the current regime of federal habeas review permanently forecloses consideration of such claims. The strict enforcement of procedural defaults ensures that many death-sentenced inmates will be executed notwithstanding constitutional error in their cases.

The Court has also crafted limitations on the ability of inmates to benefit from "new" law on federal habeas. The Court's nonretroactivity doctrine, set forth in *Teague v. Lane*,[160] is ostensibly designed to prevent excessive dislocation whenever the Court identifies a new constitutional rule; its roots are traceable to the Warren Court era, when the Court's vast expansion of constitutional criminal procedure threatened to throw open the jailhouse doors. But in its more recent incarnation, the nonretroactivity doctrine has

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[158] *See* Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).
[159] *See, e.g.,* Hedrick v. True, 443 F.3d 342 (4th Cir. 2006) (defaulting defendant's claim of ineligibility for the death penalty based on mental retardation).
[160] 489 U.S. 288 (1989).

blocked retroactive application of many decisions far less dramatic or path-breaking than the Warren Court rulings which had given rise to the doctrine. The Supreme Court, as well as lower federal courts, have rejected as impermissibly "novel" claims that are barely distinguishable from previously decided cases.[161] Apart from generating extraordinary time-consuming and complex litigation, *Teague* has thwarted the development and evolution of constitutional principles surrounding the administration of capital punishment. Federal habeas courts are discouraged from modestly extending or refining established precedents, so all constitutional realignment must come from the Supreme Court itself (on direct review of state criminal convictions). This institutional arrangement is a built-in headwind against adaptation to changing circumstances, and given the Eighth Amendment's focus on "evolving standards of decency," the *Teague* doctrine is at cross-purposes with the underlying substantive law of the death penalty.

The most significant reform of federal habeas is embodied in AEDPA's unprecedented limitations on the availability and scope of federal review. AEDPA imposes a strict statute of limitations for filing in federal court,[162] stringent limitations on successive petitions,[163] and restrictions on the availability of evidentiary hearings to develop facts relating to an inmate's underlying claims.[164] These procedural barriers have proven formidable, and many inmates have lost their opportunity for federal review of their federal claims on these grounds. The most far-reaching of AEDPA's provisions, though, has been the elimination of de novo review for federal claims addressed on their merits in state court. In its place, AEDPA requires, as a condition for relief, that the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[165] This statutory revision essentially requires federal courts to defer to wrong but "reasonable" decisions by state courts. It insulates from review all decisions but those that demonstrably flout established rules. In many areas of constitutional doctrine, this "reasonableness" standard of review amounts to "double deference" on federal habeas. Numerous constitutional doctrines, including the Court's standards for reviewing the effectiveness of counsel or a prosecutor's alleged discriminatory use of peremptory challenges, already require deferential review of the underlying conduct; state courts are not expected to grant relief unless trial counsel's performance wildly departed from established norms or a prosecutor's race-neutral explanation defies belief. When these cases get to federal habeas, AEDPA imposes an *additional* level of deference. For Sixth Amendment claims concerning the right to effective counsel, the question is not whether trial counsel's performance was unreasonably deficient – it is whether the state court's determination of reasonableness was *itself* unreasonable. This relaxation of federal review of state decisionmaking essentially insulates all but the most egregious denials of rights in state court.

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[161] *See, e.g.,* Butler v. McKellar, 494 U.S. 407 (1990) (holding that the rule prohibiting police-initiated interrogation concerning a separate offense in the absence of counsel, Arizona v. Roberson, 486 U.S. 675 (1988), was novel notwithstanding an earlier decision that had addressed a virtually identical Fifth Amendment violation, Edwards v. Arizona, 451 U.S. 477 (1981)).

[162] 28 U.S.C. §2244(d)(1).

[163] 28 U.S.C. §2244(b).

[164] 28 U.S.C. §2254(e)(2).

[165] 28 U.S.C. §2254(d)(1).

AEDPA's significance in curtailing federal enforcement of federal rights is reflected in the substantial decline in habeas relief since AEDPA's enactment.[166] It is also reflected in numerous federal habeas decisions that explicitly recognize that relief might be required under de novo review. For example, the Fifth Circuit Court of Appeals recently reversed a District Court grant of relief on a claim of impermissible judicial bias.[167] The state court judge, at petitioner's capital trial, had indicated in open court that he was "doing God's work to see that [Petitioner] gets executed;" the judge also taped a postcard to the bench depicting the infamous "hanging judge" Roy Bean, altering it to include his own name and self-bestowed moniker, "The Law West of the Pedernales;" and the judge engaged in extensive ex parte contacts with the prosecution, threatened to remove petitioner's attorneys, and laughed out loud during the defense presentation of mitigating evidence at the punishment phase. The panel opinion recognized that such conduct might require relief under de novo review, but reversed the District Court because it could not find the state court's rejection of the bias claim unreasonable.[168] AEDPA's mandated deference, which ratifies unconstitutionally obtained death-sentences absent gross negligence on the part of the state court, removes the strongest incentive for state courts to toe the constitutional mark and allows executions to go forward despite acknowledged constitutional error.

Unlike several of the institutional and structural obstacles to the fair and accurate implementation of the death penalty described above, the scope of federal habeas is subject to legislative and judicial revision. But it seems unlikely that meaningful reform or restoration of federal habeas will be forthcoming. The politicization of criminal justice issues makes it extraordinarily difficult to expand review, and all of the pressures run in the other direction. In the absence of reform, though, the Court's minimalist constitutional regulation becomes virtually irrelevant; though enormous resources are expended in federal habeas, and the litigation results in delayed executions, most of the energies are directed toward overcoming procedural barriers rather than enforcing the underlying substantive rights of death-sentenced inmates.[169] Despite the articulation of many constitutional protections, the enforcement is relegated to state courts, and at least some of those courts, particularly in active executing states, are notably unsympathetic to the Court's regulatory efforts. Indeed, in a Texas case recently twice reversed by the Court, Texas judges repeatedly voiced their prerogative to disagree with the Court's constitutional conclusion.[170]

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[166] *See supra*, note 70.

[167] Buntion v. Quarterman, 524 F.3d 664 (5th Cir. 2008).

[168] *Id.* at 67 ("Although we might decide this case differently if considering it on direct appeal, given our limited scope of review under AEDPA, we are limited to determining whether the state court's decision was objectively unreasonable.").

[169] Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. L. Forum 315.

[170] Ex parte Smith, 132 S.W.3d 407, 427 (Tex. Crim. App. 2004) (Hervey, J., concurring) ("[H]aving decided that no federal constitutional error occurred in this case, we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case.") (summarily reversed in Smith v. Texas, 543 U.S. 37 (2004)); Ex parte Smith, 185 S.W.3d 455, 474 (Tex. Crim. App. 2006) (Hervey, J., concurring) ("[W]e are not bound by the view expressed in *Penry II* that Texas jurors are

The inadequacy of federal habeas review to enforce federal rights is lamentable in itself; but it also generates the same legitimation problem described above. Despite the Court's seeming regulation of the American death penalty via its declaration of substantive rights, the procedural mechanisms currently in place under-enforce those protections. Casual observers of the death penalty will likely regard the death sentences and executions that emerge from the current process to be the product of careful, extensive review by many courts. The reality, though, is much different. States have essentially the first and last opportunity to focus on the constitutional merits of inmates' claims. After that review, the many years of legal wrangling is primarily spent navigating the procedural maze and deferential forum that federal habeas has become. Thus, even if increased constitutional regulation of the death penalty could solve many of the deficiencies of the prevailing system, which appears unlikely, the inadequate mechanisms for enforcing that regulation would in any case undermine the effort.

VIII. The Death Penalty's Effect on the Administration of Criminal Justice

The preceding sections highlight the constitutional, institutional, and structural obstacles to the fair and accurate administration of the death penalty. But the problems with the American death penalty are not confined to the capital system. The current battles over the scope of the death penalty may have consequences for the broader American criminal justice scheme. In particular, the presence of the death penalty may tend to normalize and stabilize the extremely punitive sanctions prevailing on the non-capital side; the constitutional regulation of the death penalty – with its explicit death-is-different caveat – has further insulated non-capital practices from significant scrutiny; concerns about inefficiencies in the capital system – particularly delays between trial and sentence – have led to significant restrictions on the habeas rights of non-capital inmates; and the demands of the capital system drain resources from the non-capital defense system and the state and federal judiciaries more generally. A decision about the Institute's stance on capital punishment must take account of these spillover costs imposed by the current capital regime.

Capital punishment constitutes only a tiny part of the criminal justice system. Fewer than 50 people were executed and slightly over 100 people were sentenced to death nationwide in 2007, while considerably over two million people remain incarcerated in the non-capital criminal justice system. The death penalty does not even constitute a substantial part of our system for punishing *homicide*. In a country that has experienced between 15,000 and 20,000 homicides per year nationwide over the past decade, the number of capital sentences and executions last year looks particularly trivial. The relative paucity of death sentences and executions does not disappear if we focus on the high-water marks for death-sentencing and executions in the modern era, with highs for death sentences in the 300s (per year, nationwide) and executions hovering close to 100 (per year, nationwide).

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incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case.") (on remand from summary reversal) (reversed in Smith v. Texas, 127 S. Ct. 1686 (2007)).

At the same time, the non-capital system has experienced extraordinary growth. Over the past three decades, the country has embarked on an unprecedented experiment with mass incarceration. The jail and prison population of the United States has grown eight-fold over the past 35 years. In addition to imprisoning the most inmates in absolute terms worldwide, the United States also has an incarceration rate that is five to eight times higher than other Western industrialized nations; the United States has recently achieved the dubious distinction of imprisoning more than one out of every hundred of its adults. Much of the expansion of the prison population is attributable to more punitive sentencing regimes, especially for non-violent offenders. National spending on incarceration has reached unprecedented levels, with estimates that states and the federal government spend over $65 billion annually to house the more than 2.3 million inmates held nationwide. Moreover, the rate of incarceration in minority populations is particularly high, with one in nine black males between the ages of 20 and 34 behind bars.

Despite the enormous social and political costs of our mass incarceration policies, reform efforts have been unable to reverse the remarkable trends. The presence of the death penalty, especially the recent focus on the possibility of executing innocents, might well undermine the prospects for non-capital reform. First, the very existence of the death penalty blunts arguments about the excessive punitiveness of non-capital sanctions. Indeed, death penalty opponents approvingly argue in *favor* of harsh incarceration sanctions (including life without parole) as a way of undermining support for the death penalty. In this respect, the death penalty deflects arguments about the ways in which lengthy incarceration (and the absence of alternative sanctions) imposes substantial costs and undermines human dignity: lengthy incarceration is viewed as a "lesser" evil instead of as an evil in itself. Second, the innocence focus wrought by the death penalty and projected on to the rest of the criminal justice system tends to emphasize the *selection* of those to be incarcerated rather than on the normative underpinnings of our incarceration policy. Tinkering with the investigation and prosecution of crime will leave untouched the prevailing punitive framework. The one important link between wrongful convictions and excessive punitiveness is frequently missed in public and professional debate: the presence of extremely harsh sanctions encourages plea-bargaining, and when the plea-bargain discount is sufficiently high, excessive punishments encourage false confessions. But few advocates of reform have sought to attack the problem of wrongful convictions by reducing the harshness of our current sanctions. The focus on innocence in contemporary death penalty discourse also tends to legitimate and entrench the justice of harshly punishing the guilty. The more precariously-held values of fairness, non-discrimination, adequate representation, and procedural regularity are endangered by equating injustice with inaccuracy.

The death penalty's deflection of policy-based criticisms of our extraordinarily punitive non-capital system is exacerbated by the Court's highly-visible constitutional regulation of the death penalty. Over the past decade, the Court has issued three landmark decisions limiting the reach of the death penalty. Two of the decisions, *Atkins*

v. Virginia[171] and *Roper v. Simmons*,[172] held that the death penalty was disproportionate as applied to particular offenders – juveniles and persons with mental retardation. The third decision, *Kennedy v Louisiana*,[173] held that the death penalty was constitutionally disproportionate as applied to a particular offense – the rape of a child – though the Court's reasoning was considerably broader, indicating that the death penalty is disproportionate as applied to any non-homicidal ordinary crime (distinguishing offenses against the State such as espionage and treason). Together, these decisions reflect a considerable broadening of the criteria available to discern evolving standards of decency, including evidence of elite, professional, and world opinion. Two of the cases – *Atkins* and *Simmons* – overruled relatively recent decisions, and, along with *Kennedy*, the decisions signal an unprecedented willingness of the Court to rein in capital practices deemed excessive.

But at the same time the Court has demonstrated a willingness to protect against disproportionate punishment on the capital side, it has wholly deferred to states in their imposition of harsh terms of incarceration. In between its pronouncements in *Atkins* and *Simmons*, the Court upheld the operation of California's "three-strikes-you're-out" law that resulted in a 25-years-to-life sentence for a repeat offender convicted of attempting to steal three golf clubs from a golf course pro shop.[174] In a choice of quotation that reveals just how difficult the non-capital proportionality test is meant to be, the Court reached back to repeat its observation from an earlier case that the proportionality principle might "come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment."[175]

There may be strong institutional and practical reasons for providing robust proportionality review in capital cases while deferring to extremely punitive and rare non-capital sentences. But the death-is-different principle might contribute to a false sense of judicial oversight, especially in light of the enormous visibility and salience of the death penalty both within the United States as a symbol of crime policy and in the broader world as a symbol of American punitiveness. In this respect, the Court's capital jurisprudence offers a means to legitimate American penal policy by ameliorating some of its harshest aspects and portraying the Court as a counter-majoritarian scrutinizer of state penal policy, while leaving the fundamental pillars of America's true penal exceptionalism intact. The United States' status as the world's leading incarcerator remains untouched by the constitutional regulation of capital punishment, yet such regulation gets a disproportionate degree of attention because of the power of the death penalty as a symbol in numerous different arenas. As a result, constitutional regulation of capital punishment both obscures and normalizes the excesses of American penal policy. The problems of mass incarceration, racial disparities in punishment, and the endless war on drugs are obscured because they inevitably fall into the shadows when the spotlight of

[171] 536 U.S. 304 (2002).
[172] 543 U.S. 551 (2005).
[173] 128 S. Ct. 2641 (2008).
[174] Ewing v. California, 538 U.S. 11 (2003).
[175] *Id.* at 21 (internal quotation marks omitted) (quoting Rummel v. Estelle, 445 U.S. 263 (1980) (upholding a life sentence with possibility of parole for a repeat offender convicted of obtaining $120.75 by false pretences)).

national and world attention are focused by the Court on highly dramatic issues regarding American death penalty practices. Moreover, extremely lengthy sentences are normalized by capital litigation: successful capital litigants, after all, are almost always "rewarded" with sentences of life without possibility of parole. Even the lengthiest sentences lose their horror when they are so avidly sought and so victoriously celebrated by the (rarely) successful capital litigant. In these ways, the narrow successes of capital litigants under the Eighth Amendment offer little comfort to and indeed likely limit the chances of successful challenges by the vastly larger group of non-capital litigants. Of course, a proponent of our severe non-capital policies would not find worrisome any reinforcement of such policies. But the many critics of our current trend toward mass incarceration should pay attention to the ways in which the retention of capital punishment may entrench and legitimate that trend.

As noted above, concerns about the administration of the death penalty – particularly the length of time between the imposition of death sentences and executions – led to stringent procedural and substantive limits on the availability of federal habeas for state prisoners. Although the title of the legislation – the Antiterrorism and Effective Death Penalty Act – suggests a purpose unrelated to the status of non-capital inmates, the restrictions were made to apply globally. In addition, many of the restrictions imposed by AEDPA – its one-year statute of limitations, its absolute ban on same-claim successive petitions, its higher bar for filing new-claim successive petitions, its onerous exhaustion provisions, and its restrictions on the availability of federal evidentiary hearings – actually impose special hardships on non-capital inmates; unlike those sentenced to death, indigent non-capital inmates have no statutory right to counsel in state or federal habeas proceedings. As difficult as it is for death-sentenced inmates to navigate AEDPA's procedural maze, the burdens on non-capital inmates are virtually insurmountable. The already low-rate of relief for non-capital inmates pre-AEDPA (1 in 100) has apparently dropped considerably post-AEDPA (1 in 341) according to a recent study.[176] Thus, concerns about the skewed incentives on the capital side – in which inmates have every reason to delay seeking relief in federal court – have generated restrictions for the vastly larger group of non-capital inmates whose incentives are quite different. More generally, this example illustrates the risk of capital litigation driving broader criminal justice policy, and the peculiar dynamic of a small subset of American prisoners framing the debate over the appropriate operation of larger institutional frameworks.

Although death penalty inmates are a small fraction of the overall prison population, the death penalty extracts a disproportionately large share of resources at every stage of the proceedings. As discussed above, capital trials are enormously more expensive than their non-capital counterparts, and the decision to pursue a capital sentence often has significant financial consequences for the local jurisdiction. Indigent defense is notoriously underfunded in both capital and non-capital cases, and the resources devoted to the capital side often come directly at the expense of the rest of the

[176] *See* Nancy J. King, Fred L. Cheesman II, & Brian J. Ostrom, *Habeas Litigation in U.S. District Courts: An empirical study of habeas corpus cases filed by state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, National Center for State Courts, Aug. 21, 2007, at p. 9.

indigent defense budget. In this respect, death penalty prosecutions threaten to compromise an already over-burdened and under-funded indigent defense bar, in addition to imposing daunting costs on local prosecutors and their county budgets. The political pressures and high emotions in capital cases can sometimes overwhelm sober assessments. The famous Texas litigation involving John Paul Penry reflects this dynamic, as his three capital trials generated millions in county expenses before he pled to a life sentence (after three reversals of his death sentences). Following the Supreme Court's invalidation of his first sentence, the local District Attorney declared to the press, "if I have to bankrupt this county, we're going to bow up and see that justice is served."[177] More recently, the Chair of the Florida Assessment Team for the ABA Death Penalty Moratorium Implementation Project reported that "all members of the Assessment Team, including those representing the state, were deeply worried that the expenditure of resources on capital cases significantly detracts from Florida's ability to render justice in *non*-capital cases."[178]

In addition to these financial costs, the death penalty places enormous burdens on state and federal judicial resources. In some states, such as California, the burdens imposed by capital cases on appellate courts compromise the ability of those courts to manage their competing commitments on the civil and non-capital side. The burdens imposed are not merely a function of the sheer time required for capital litigation; the frenetic, last-minute litigation in active executing states exacts its own toll on judges and court personnel and likely negatively affects the courts' fulfillment of their non-capital obligations. The possibility of even greater disruption along these lines looms with the increased likelihood that AEDPA's "opt-in" provisions[179] will become operative. Those provisions give fast-track status to death-sentenced inmates from states that create a system for the appointment and compensation of competent counsel in state postconviction. Under the opt-in provisions, once a state has satisfied the opt-in requirements, the state receives the benefit of a shorter statute of limitations for death-sentenced inmates filing in federal habeas (six months instead of one year) and the federal courts are under strict deadlines for ruling on claims, including the congressionally-imposed requirement that capital cases take priority over the rest of the federal docket. A literal reading of the opt-in provisions would require federal courts to halt on-going proceedings (trials, hearings, etc.) until capital habeas petitions are resolved ("The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters."[180]). In this respect, the death penalty makes extraordinary demands on the American courts and threatens the quality of justice for all litigants, including those outside the capital process.

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[177] Steve Brewer, *Penry likely to face retrial, officials say*, The Huntsville Item, Jul. 1, 1989, p.3A.
[178] Christopher Slobogin, *The Death Penalty in Florida*, Vanderbilt University Law School Public Law and Legal Theory Working Paper 08-51 (November, 2008).
[179] 28 U.S.C. § 2261.
[180] 28 U.S.C. §2266(a).

CONCLUSION

The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment, either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, these conditions strongly suggest that the Institute recognize that the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.